CHAPTER 5
THE HAWAI'I ADMINISTRATIVE PROCEDURES ACT
AND ADMINISTRATIVE RULE-MAKING

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INTRODUCTION

The Hawai'i Administrative Procedures Act¹ (HAPA) establishes the procedures which State and county governmental agencies must follow when they make rules. Administrative rule-making is the primary means for an agency to carry out its responsibilities. Generally, a law serves as an outline of the program for which the agency is responsible. The law may not provide the agency with detailed specific direction for every circumstance. The agency must fill in the outline and provide the ground rules for carrying out the program on a daily basis. For example, the State Water Code, which is found at Hawai'i Revised Statutes (H.R.S.) Chapter 174C, states that, before any withdrawal, diversion, impoundment, or consumption of water for non-domestic purposes is made in any designated water management area in the State of Hawai'i, a water use permit must be obtained from the State Commission on Water Resource Management (Commission). The Water Code, however, does not explain in detail how to apply for a permit or precisely what information must be provided to the Commission as a part of the application process. This type of detail is developed through administrative rules.

HAPA requires administrative agencies to follow certain clearly defined procedures for promulgating rules. The agency must (1) publish notice of a public hearing on the rule; (2) hold a hearing in which everyone is allowed to express his or her feelings on the rule; (3) receive the Governor's approval of the rule, and (4) file the final rule in the Office of the Lieutenant Governor.

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This Chapter discusses the process agencies must follow under HAPA when making rules. Agencies may have additional requirements and procedures. Examples of procedures for rule-making that agencies such as the Department of Health (DOH) follow when making rules are also described. The requirements for administrative rule-making differ from the rules for contested case hearings. Contested case hearings are discussed in the following Chapter.

HAWAI'I ADMINISTRATIVE PROCEDURES ACT (HAPA)

Adoption, Amendment or Repeal of Rules

1. Public Notice

An agency must give at least 30 days' notice of a public hearing before adopting, amending (changing) or repealing (getting rid of) a rule. This notice must include: 1) the substance or description of the rule, 2) where and how the public can request a copy of the rule and 3) the date, time and place of the hearing. Notice is mailed to people who have requested it¹ and is published at least once in a local newspaper.⁴ County agencies must provide notice of proposed rule-making in the newspaper of the affected county. The notice requirement is intended to inform the public adequately for interested persons to make comments on a proposal.

Emergency Rule

The 30 day notice is not required if an agency finds an impending danger to public health, safety or morals or to the health of livestock and/or poultry. In such circumstances, the agency must state in writing the reasons for its finding that such a danger exists. It may then act without giving notice or holding a public hearing. Any rule enacted under this emergency rule exception is good for 120 days. It is intended that the regular procedure can be completed during the 120 days and a final rule be adopted if appropriate.

2. Public Hearings

After notice, the agency must hold a public hearing on the proposed rule. At the hearing, interested parties may submit oral and/or written testimony. (See Chapter Four for tips on how to present testimony). The agency is required to consider all testimony when
making its decision on the proposed rule. The agency can reach a decision on the proposed rule at the close of the hearing or at a later specified date. Any person can request, and the agency must issue, a detailed statement of the basis for the agency's decision. Before an administrative rule becomes final and binding, it must be approved by the Governor. Similarly, all county rules must be approved by the Mayor of the affected county.

3. Publication of the Rules

After an administrative rule is approved by the Governor or Mayor, it must be filed with the Office of the Lieutenant Governor or with the clerk of the affected county. The rule is binding on the public 10 days after filing. A permanent register of the rules is kept by the Lieutenant Governor's office. Each agency must assemble and publish its administrative rules. An agency rule is not valid unless and until it has been published or made available for public inspection. Copies of any rule may be obtained by calling or writing to the Lieutenant Governor's office or the relevant agency.

Petition for Adoption, Amendment or Repeal of Rules

Anyone may petition an agency to adopt, change or revoke a rule. The petitioner must provide the agency with a written statement of the basis for the petition. An agency has thirty days from the date a petition is submitted to deny the petition. The agency must deny the petition in writing, stating its reasons for denial. Otherwise, the agency should initiate the rule-making process described above.

Challenging a Rule

The legal validity of a rule may be challenged within 3 years of the date on which the rule became final. A rule's validity may be challenged by bringing an action in circuit court. If the rule violates a constitutional or statutory provision, or exceeds the agency's statutory authority, or was adopted in non-compliance with HAPA, the circuit court can declare the rule invalid. In addition, any person can seek from the agency a declaratory order regarding the applicability of the rule to a given situation. This petition for a declaratory order is an important tool for the public as it requires the agency to state exactly how its rules will apply. The agency's response may, in some cases, provide the basis for a judicial challenge to the rule, for example, if it shows the rule violates the Constitution or some other law.
The following sections describe the administrative rule-making procedures of two agencies, the Department of Health (DOH) and the Department of Land and Natural Resources (DLNR).

DEPARTMENT OF HEALTH PROCEDURES FOR RULE-MAKING

Rule-making procedures

1. Notice

To begin the process whereby the Department of Health (DOH) adopts, changes or revokes a regulation, it must publish notice of the proposed rule-making at least once in a newspaper of general circulation in the State at least 30 days before hearing on the proposed rule. Any person may request advanced notice of all DOH proposed rule-makings. Asking for such notices will ensure you will know of future proposed action and will not be caught off guard. As a practical matter, it may be the only sure means of receiving notice and having time to prepare a response to the proposed action. Notice must include: 1) the date, time and place of the hearing; 2) the agency's legal authority to engage in rule-making; 3) an explanation of the rule and its purpose; and 4) the rule's docket number.

2. Public Hearing

The Director of the DOH is in charge of and, unless he or she delegates the responsibility, conducts the hearing. Any person may testify and present evidence in support of or opposition to a proposed rule. Parties may also file a written protest or comments in support of or opposition to the rule-making at least 5 days before the hearing. An original and 2 copies of the written protest must be filed with the DOH. At the close of a hearing, the Director or a designated hearings officer will announce the decision or will inform all present of the date when a decision will be made. In some cases, the hearing may be continued to gather more data or information. If so, all present at the hearing will be advised of the date, time and place of the continuance.

3. Petition to adopt, change or get rid of rules

Any interested party can petition the DOH to issue, change, or revoke a regulation. The petition should provide 1) an explanation of the rule and its purpose; 2) the basis for the
request; and 3) any relevant facts, data or arguments showing why the petition should be granted. The DOH does not have to consider a petition that does not follow these guidelines. Petitions become public record when they are filed. This means that anyone can inspect and/or obtain a copy of a petition. The DOH must, within thirty (30) days of the filing of the petition, either deny the petition in writing or initiate rule-making procedures.

**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**PROCEDURES FOR RULE-MAKING**

**Initiating Rule-making**

Before the Department of Land and Natural Resources (DLNR) adopts, changes or revokes a rule on its own initiation or in response to a petition, it must hold a public hearing.

1. **Notice**

The DLNR must provide notice of its proposed rule-making. It must publish notice at least 30 days before the hearing and at least once in a newspaper of general circulation in the State and in each county which will be affected by the proposed rule. The notice must include: 1) the date, time and place of hearing; 2) the agency's legal authority for rule-making; 3) an explanation of the rule and its purpose; and 4) if the rule concerns making or changing forest reserve or watershed boundaries, the notice must state a time and place prior to the hearing where the public can inspect maps which show the proposed boundaries or boundary changes.

2. **Public Hearing**

If the proposed rule will affect only one county, the DLNR must hold the public hearing in that county. The chairperson of the DLNR or a designated hearing officer will conduct the hearing. At the hearing, testimony and evidence concerning the proposed rule will be received. All interested parties have an opportunity to submit data, facts or arguments relevant to the issues being considered. The DLNR will receive written protest or comments in support of or in opposition to the proposed rule-making from all interested parties. An original and 10 copies of your written protest or comments must be sent to the DLNR within 15 days before the hearing.
The decision to adopt, change or revoke the rule must consider all relevant comments and material in the record. At the close of a hearing, the chairperson of the DLNR or a designated hearings officer will announce the decision or will inform all present of the date when a decision will be made. In some cases, the hearing may be continued to gather more data or information. If so, all present will be advised of the date, time and place of the continuance.

3. Petitions to adopt, change or get rid of rules

Anyone can petition the DLNR to adopt, change, or revoke a rule. Petitions must include 1) an explanation of the rule and its purpose; 2) the reasons for the petition; and 3) any facts, data or arguments relevant to the petition. Petitions become public record when they are filed and so may be accessed by anyone. Within 30 days, the DLNR will either deny the petition in writing or initiate rule-making procedures. The DLNR may deny a petition if it finds that 1) the petition does not state sufficient reasons for the rule-making or 2) the petition does not follow the guidelines.

CONCLUSION

HAPA is a very important law. It provides all of Hawai‘i’s residents with the opportunity to participate in the rule-making process. Public involvement and participation is an important and essential part of the rule-making process. HAPA’s requirements are intended to ensure that agencies, through their administrative rules, are fair and consistent in their decision-making. However, HAPA’s effectiveness depends upon public participation.

1 HAW. REV. STAT. Chapter 91, § 91-1 through 91-9 (1995).
2 H.R.S. § 91-3.
3 People interested in receiving this mailed notice must make a timely written request of the agency for advance notice of its rule-making proceedings.
4 Local papers of general circulation include the Honolulu Advertiser and the Honolulu Star Bulletin. A proposed rule that has the force and effect of law throughout the State must be published in all counties. If affecting only certain counties, the notice must be published in newspapers in those counties affected.
5 H.R.S. § 91-6.
H.R.S. § 91-7.

The presiding officer can extend the time for filing written protests if there is good cause.