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BOARD OF REGENTS

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MEMORANDUM

TO: Lee Putnam

Chairperson, Board of Regents

UNIVERSITY OF HAWAII
PRESIDENT'S OFFICE

VIA:

David Lassner
President

FROM:

Marcia Sakai

Interim Chancellor, UH Hilo

SUBJECT: Approval of administration's recommendation to hold a second round of public hearings on the revised draft of Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands."

A. SPECIFIC ACTION REQUESTED

On behalf of the Office of Maunakea Management ("OMKM"), we request that the Board of Regents ("Board") approve the University administration's recommendation to hold a second round of public hearings on the revised draft of Chapter 20-26, Hawai'i Administrative Rules ("HAR"). Public hearings for the first formal draft of the rules, entitled "Public and Commercial Activities on Mauna Kea Lands" (hereinafter, "MKR Draft I") were held in September 2018. Public comments received during those hearings were considered and led to revisions and a second informal draft ("MKR Draft II"). The MKR Draft II has been made available informally for public comments. Comments received on MKR Draft II were considered, and the draft of the rules attached hereto as Attachment "A" ("MKR Draft III") reflects changes made in response to those comments. Approving this recommendation would allow OMKM to hold formal public hearings on MKR Draft III.

B. RECOMMENDED EFFECTIVE DATE

Effective upon approval.

C. ADDITIONAL COST

The costs and fees for the September 2018 public hearings held at four sites on Oahu, Maui, and Hawaii Island (Hilo and Waikoloa), totaled \$24,632.21. This included

200 W. Kāwili St.
Hilo, Hawai'i 96720-4091
Telephone: (808) 932-7348
Fax: (808) 932-7338
hilo.hawaii.edu

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costs and fees related to facility rentals, publication of notices, travel and lodging for staff and the 'ōlelo Hawai'i translator, and the court reporter and transcripts. The second round of public hearings will be conducted in the same areas. We expect costs and fees to remain approximately the same.

D. PURPOSE

The University is authorized by Section 304A-1903, Hawai'i Revised Statutes ("HRS"), "to adopt rules pursuant to Chapter 91 to regulate public and commercial activities on Mauna Kea lands." This request seeks approval to hold formal public hearings on MKR Draft III, under Section 91-3, HRS. This request is procedural in nature; the Board is not being asked to adopt the subject rules at this time. However, based on the significant and substantial public outreach and comments, we expect to bring proposed rules forward after the public hearings that do not include significant changes from Draft III for approval by the Board.

E. BACKGROUND INFORMATION

1. Development and rule-making process

OMKM developed the subject rules pursuant to 2009 Hawai'i Session Laws Act 132, which is codified in relevant part as Sections 304A-1901 through 304A-1905, HRS. Specifically, Section 304A-1903, HRS, provides as follows:

Mauna Kea lands; rules. The board of regents may adopt rules pursuant to chapter 91 to regulate public and commercial activities on Mauna Kea lands.

In adopting these rules, the board shall:

(1) Strive for consistency with the administrative rules of the division of forestry and wildlife of the department of land and natural resources related to forest reserves and natural area reserves;

(2) Consult with the office of Hawaiian affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupuaa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights; and

(3) Hold at least one public hearing, in addition to the public hearing at which decision-making on the proposed rule is made, on the island of Hawai'i.

The development of the proposed rules is an ongoing process that started with discussions at the Maunakea Management Board ("MKMB") soon after it was formed in the year 2000. The University was granted authority to adopt rules for Maunakea by Act 132 in 2009. During the development of these rules, OMKM held open houses and numerous public outreach sessions seeking feedback on the rules. In addition, it continues to consult with the Office of Hawaiian Affairs ("OHA") and seek input from the Department of Land and Natural Resources ("DLNR"), MKMB, and Kahu Kū Mauna ("KKM"), the native Hawaiian advisory council to OMKM. The rules in large part reflect existing DLNR forest reserve and natural area reserves administrative rules.

The following are the most recent significant milestones in the rulemaking process since the Board's last action on this item on October 18, 2018:

- October 18, 2018, the Board granted approval to draft revisions to specific provisions in MKR Draft I and to return to the Board for approval of the new draft prior to conducting a second round of public hearings.
- February 12, 2019, the University posted MKR Draft II and a table showing the changes made and the rationale for those changes at <https://www.hawaii.edu/news/2019/02/12/university-seeks-comments-informal-draft-maunakea-rules>. The public was invited to comment by post and e-mail on or before Friday, March 15, 2019, at 4:30 p.m. During this time, the University also reached out directly to other interested persons and groups including the protectors, homestead organizations, UH Mānoa and UH Hilo faculty, astronomy representatives, and business communities.
- March 14, 2019, the University met with the director of DLNR and her staff in the University's continued effort to strive for consistency with DLNR's administrative rules related to forest reserves and natural area reserves.
- April 4, 2019, the University met with OHA to continue its consultation on the rules as required by Act 132.

Previous milestones and outreach are documented in Board materials, including materials submitted for Board meetings on May 21, 2018, and October 18, 2018.

2. Scope of the rules

The scope and application of the University's rulemaking authority is limited to "Mauna Kea lands," which is defined in Section 304A-1901, HRS, as follows:

"Mauna Kea lands" means the lands that the University of Hawai'i is leasing from the board of land and natural resources, including the Mauna Kea Science Reserve, Hale Pohaku, the connecting roadway corridor between Hale Pohaku and the Mauna Kea Science Reserve, and any other lands on Mauna Kea that the University of Hawai'i leases or over which the University of Hawai'i acquires control or jurisdiction.

Section 304A-1903, HRS, authorizes the University to develop rules "to regulate public and commercial activities on Mauna Kea lands," consistent with Forest Reserve System¹ and Natural Area Reserves System² rules administered by the DLNR. Therefore, like DLNR's rules and as called for by the legislature in Act 132, MKR Draft III regulates public and commercial activities such as general access to sensitive resource areas; traffic and off-road vehicle management and control; alcohol consumption; recreational activities; and commercial tour activities. The University's proposed rules do not regulate non-public, non-commercial activities, such as scientific, educational, and management functions. The proposed rules regulate "activities" not "land uses," which are governed by DLNR's conservation district rules.³

Section 91-3, HRS, requires that the University "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing," and that the University "shall fully consider all written and oral submissions respecting the proposed rule." MKR Draft III includes changes made in consideration of written and oral submissions regarding MKR Drafts I and II. Attachment "B" attached hereto, is a table summarizing the changes made to MKR Draft I that resulted in MKR Draft III and the rationale for those changes. The changes in MKR Draft III include consideration of the comments from the September 2018 hearings and subsequent comments received during informal outreach. Attachment "C" is a summary of comments received during informal outreach on MKR Draft II. Comments on MKR Draft I can be found in the October 18, 2018 Board submittal.

As previously noted, Section 304A-1903(1), HRS, requires that the University "[s]trive for consistency with the administrative rules of the division of forestry and wildlife of the department of land and natural resources related to forest reserves and natural area reserves." Based on consultation with DLNR, MKR Draft III is not inconsistent with said DLNR rules. Furthermore, many of the provisions and the basic framework of MKR Draft III is based on said DLNR rules.

As also previously noted, Section 304A-1903(2), HRS, specifically requires that the University, "[c]onsult with the office of Hawaiian affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupuaa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." In addition, section 304A-1904, HRS, requires that the University consult with OHA on administrative fines for violation of the rules. MKR Draft III includes considerations based on consultation with OHA.

¹ See, e.g., Chapter 13-104, HAR, *Activities Within Forest Reserves*.

² See, e.g., Chapter 13-209, HAR, *Activities Within Natural Area Reserves*.

³ Chapter 13-5, HAR, *Conservation District*.

3. Summary of Changes Made

A number of testifiers at the public hearings found MKR Draft I to be overly prescriptive as relating to the protection of customary and traditional rights. While this language had been developed in consultation with OHA, it became clear that this was a contentious point and that language that was intended to protect such practices and rights was not universally viewed in that light. It was removed from MKR Draft II and feedback on this point was less negative. As summarized in Attachment "B," based on direct outreach on MKR Draft II, we added a reference to Article XII, section 7, of the Hawai'i Constitution to HAR § 20-26-3, entitled "Applicability and implementation, generally." In addition, a suggestion in MKR Draft II that bicycling be prohibited to the summit was widely criticized. That section, also summarized in Attachment "B," has been revised to allow bicycling on the unpaved road above Halepōhaku with approval.

As with most administrative rules, it is important to note that MKR Draft III is not universally supported by all stakeholders. The management and oversight of public lands invoke deep and passionate discussion among various users and sometimes competing uses. As the record in this rulemaking process shows, not all stakeholders agree on difficult matters relating to Maunakea. However, we believe MKR Draft III is an important step in addressing the longstanding need for administrative rules on lands managed by the University to replace the public and commercial activities rules that formerly applied under DLNR's forest reserve and natural area reserve rules. It also provides important and useful capabilities not available today so the University can reduce vehicular traffic on the mountain, update permits and rates for commercial tour operators, address serious abuses such as the recent extreme sports episode, and ensure the protection of traditional and customary practices and rights.

4. Next Steps

If the Board approves the requested action, OMKM will conduct public hearings on MKR Draft III similar to those held in September 2018 on MKR Draft I, with one in Honolulu, two on the Island of Hawai'i, and one on Maui.

Comments received during the public hearing process will be fully considered, and further revisions to the subject rules may be made as appropriate. KKM and MKMB will be consulted prior to returning to the Board seeking approval for adoption of the draft rules as they have been amended.

After Board adoption, approval must also be obtained from the Governor, following a review of the final text by the Small Business Regulatory Review Board and the Attorney General. This extensive review and approval process is expected to be completed, and the final rules to be adopted and effective, in 2020, assuming no further public hearing process is necessitated by substantial changes. This date was moved forward a year to allow for additional public comments and outreach after changes were made to the rules after the September 2018 hearings.

F. ACTION RECOMMENDED

We request that the Board approve the University administration's recommendation to hold a second round of public hearings on the revised draft of Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands" [MKR Draft III].

G. ATTACHMENTS

- Attachment "A" – Proposed Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands" [MKR Draft III]
- Attachment "B" – Summary of All Revisions to MKR Draft I
- Attachment "C" – Summary of Informal Comments Received on Informal Draft Rules

c: Kendra Oishi, Executive Administrator and Secretary to the Board, University of Hawai'i