



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

2021 JUL 19 PM 2:12

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
Department of Land and Natural Resources  
Administrative Proceedings Office  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813  
Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Mālama Kua'āina	2. Contact Person Caren Diamond	
3. Address P.O. Box 536	4. City Hanalei	5. State and ZIP Hawai'i, 96714
6. Email malamakuaaina@gmail.com	7. Phone (808) 652-0790	8. Fax N/A

B. ATTORNEY (if represented)		
9. Attorney Name Isaac Moriwake (#7141), Elena Bryant (#9548)	10. Firm Name EARTHJUSTICE	
11. Address 850 Richards Street, Suite 400	12. City Honolulu	13. State and ZIP Hawai'i, 96813
14. Email: imoriwake@earthjustice.org ebryant@earthjustice.org	15. Phone (808) 599-2436	16. Fax (808) 521-6841

**C. SUBJECT MATTER****17. Board Action Being Contested**

Approval of Conservation District Use Application SH-3877 (Applicant: DLNR) for A Programmatic Statewide Small Scale Beach Restoration (SSBR) Program Affecting Beaches of the Main Hawaiian Islands

**18. Board Action Date**

July 9, 2021

**19. Item No.**

K-2

**20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case**

See ATTACHMENT

**21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection**

See ATTACHMENT

**22. Any Disagreement Petitioner May Have with an Application before the Board**

See ATTACHMENT

**23. Any Relief Petitioner Seeks or Deems Itself Entitled to**

See ATTACHMENT

**24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest**

See ATTACHMENT

**25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR**

☒ Check this box if Petitioner is submitting supporting documents with this form.

☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

Elena L. Bryant

Petitioner or Representative (Print Name)



Signature

July 19, 2021

Date

STATE OF HAWAI‘I  
BOARD OF LAND AND NATURAL RESOURCES  
**PETITION FOR A CONTESTED CASE HEARING: ATTACHMENT**

MĀLAMA KUA‘ĀINA

July 19, 2021

---

**20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case**

Pursuant to Hawai‘i Administrative Rules (“HAR”) § 13-1-28(a), “[w]hen required by law, the board shall hold a contested case hearing upon . . . a written petition of . . . any interested person.” As detailed in the next section, Mālama Kua‘āina (“MKA”) is entitled to a contested case hearing as a matter of constitutional due process, based on numerous rights protected under the Hawai‘i Constitution, including the right to a clean and healthful environment under article XI, § 9, the right to exercise traditional and customary Native Hawaiian practices under article XII, § 7, and rights of shoreline access and protection under the public trust doctrine established in article XI, § 1.

**21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection**

MKA is entitled to a contested case hearing in this proceeding under the due process clause of the Hawai‘i Constitution, article I, § 5, to protect its members’ constitutional rights, including: their rights to a clean and healthful environment under article XI, § 9; their rights to exercise traditional and customary Native Hawaiian practices under article XII, § 7; and their rights related to public trust shoreline resources under article XI, § 1. All of these rights are “protectable property interests” that entitle MKA to a contested case hearing.



Right to Clean and Healthful Environment: As the Hawai‘i Supreme Court has now repeatedly made clear, article XI, § 9’s substantive “right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources,” establishes a “protectable property interest” entitled to due process. *In re Maui Elec. Co.*, 141 Hawai‘i 249, 261, 264, 408 P.3d 1, 13, 16 (2017) (“*MECO*”) (quoting Haw. Const. art. XI, § 9). The Court recently reaffirmed this due process right in *Protect & Preserve Kahoma Ahupua‘a Ass’n v. Maui Planning Comm’n*, \_\_ P.3d \_\_, 2021 WL 2451978, specifically in relation to the Coastal Zone Management Act (“CZMA”), HRS chapter 205A, which the Court held “is a law relating to environmental quality” under article XI, § 9. 2021 WL 2451978 at \*8. Likewise, the Conservation District statute, HRS chapter 183C, is a law expressly related to “environmental quality, including . . . *conservation, protection and enhancement of natural resources*,” Haw. Const. art. XI, § 9 (emphasis added). In nearly identical terms to this constitutional provision, Chapter 183C declares its purpose is “to *conserve, protect, and preserve the important natural resources* of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.” HRS § 183C-1 (emphasis added).<sup>1</sup> Thus, article XI, § 9’s right to a clean and healthful environment, as defined by the

---

<sup>1</sup> See also HAR § 13-5-1 (similarly declaring the purpose of the conservation district rules “to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare”); HRS § 183C-2 (defining land to include “all real property, fast or submerged, and all interests therein, including fauna, flora, minerals, and all such natural resources”).



environmental benefits of chapter 183C, establishes a “substantive right . . . [and] legitimate entitlement to that benefit as defined by state law,” which constitutes a “property interest protected by due process.” *MECO*, 141 Hawai‘i at 264, 408 P.3d at 16.

Native Hawaiian Rights: The Hawai‘i Supreme Court has also established that “[t]he right to exercise Native Hawaiian customs and traditions is explicitly protected by article XII, section 7 of the Hawai‘i Constitution.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015). The Court held that a contested case is “required as a matter of constitutional due process” to protect these rights. *Id.* In *MECO*, the Court confirmed that the rights “guaranteed by article XII, section 7 . . . are protectable interests under the due process clause.” 141 Hawai‘i at 264, 408 P.3d at 16.

Public Trust Rights: Long-standing Hawai‘i Supreme Court precedent also establishes that “public use of Hawaii’s beaches . . . has ripened into a customary right,” and that shoreline lands below the high-water mark are public trust resources. *Cnty. of Haw. v. Sotomura*, 55 Haw. 176, 182-84, 517 P.2d 57, 61-63 (1973); *see also Diamond v. Dobbin*, 132 Hawai‘i 9, 26, 319 P.3d 1017, 1034 (2014) (recognizing *Sotomura* and the “well-established public right of access to Hawai‘i’s shorelines”). The public trust has been established as a constitutional mandate in article XI, § 1. *See In re Waiāhole Ditch Combined Contested Case Hr’g*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) (“*Waiāhole*”). Among its core mandates, the public trust “requires the government of the State to *preserve [trust resources] for the use of the public*,” “*freed from the obstruction or interference of private parties*.” *Id.* at 136, 9 P.3d at 448 (emphasis in original).

Public trust rights are widely recognized as a form of protected property right.<sup>2</sup> Like the other constitutional rights above, these public trust rights are also protectable interests requiring due process.

MKA’s Rights and Interests in This Proceeding:

MKA is a 501(c)(3) organization established in 2012 to provide information, education, advocacy, and legal resources relating to the preservation and protection of the natural environment and public trust resources on the island of Kaua‘i. MKA is dedicated to the protection of Kaua‘i’s unique fragile natural resources, and its primary work focuses on shoreline and public trust issues, such as upholding beach protection and beach access, planning for coastal hazards, working on community resilience projects, and engaging in community and coastal advocacy. MKA’s work also includes the restoration of critical habitat for endangered species and the protection of dunes and the nearshore marine environment for public use and enjoyment.

MKA is greatly concerned with the impacts the SSBN proposal will have on shoreline public trust resources and the public rights and traditional and customary Native Hawaiian rights that depend on those resources, particularly along Kaua‘i’s northern coastline. MKA’s board

---

<sup>2</sup> See, e.g., *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 596 (Cal. Ct. App. 2008) (“[T]he courts in this country have treated the public trust largely as a *public property right* of access to certain public trust natural resources for various public purposes.”) (emphasis added, quotation marks omitted); *Marks v. Whitney*, 491 P.2d 374, 380-82 (Cal. 1971) (en banc) (deeming the “public trust easement” a distinct “estate or interest in,” “burden,” and “servitude” on property); *Holman v. Renaud*, 125 S.W. 843, 845 (Mo. Ct. App. 1910) (“A public trust is one in which the public at large, or some undermined portion of it, have a direct interest or *property right*.”) (emphasis added).

members regularly access the public beach, shoreline, and nearshore areas on Kaua‘i’s northern coast to engage in a variety of traditional, cultural, spiritual, religious, recreational, and aesthetic practices. They also regularly engage in public advocacy and enforcement efforts to protect the shoreline and nearshore areas along Kaua‘i’s northern coast.

Some illustrative and nonexclusive examples of MKA board members’ activities and interests related to public trust shoreline resources on the island of Kaua‘i include:<sup>3</sup>

- Caren Diamond is the Executive Director and founding Director of MKA. She is a longtime resident and advocate for protecting and preserving public beach access and coastal resources along Kaua‘i’s northern coast, including Hā‘ena, Wainiha, and Hanalei. She is the lead party-appellant in several landmark Hawai‘i Supreme Court cases on public shoreline protection<sup>4</sup> and is a recognized expert and leading community stakeholder on these issues. She and her family regularly access the beach for spiritual, recreational, and aesthetic purposes.

Over many years, Ms. Diamond has extensively documented problems with private owners engaging in shoreline altering activities along Kaua‘i’s northern coastline, such as installing sandbag revetments and planting and propagating artificial vegetation, and has submitted multiple complaints and requests for enforcement to OCCL with limited or no

---

<sup>3</sup> The allegations provided here are accepted as true for purposes of determining MKA’s rights and interests. *See Kilakila ‘O Haleakala v. Bd. Of Land & Nat. Res.*, 131 Hawai‘i 193, 209 n.9, 317 P.3d 27, 43 n.9 (2013); *see also* HAR § 13-1-31(f) (providing for a subsequent hearing to determine the parties to the contested case).

<sup>4</sup> *See Diamond v. State*, 112 Hawai‘i 161, 145 P.3d 704 (2006); *Brescia v. N. Shore ‘Ohana*, 115 Hawai‘i 477, 168 P.3d 929 (2007); *Diamond v. Dobbin*, 132 Hawai‘i 9, 319 P.3d 1017 (2014).



response and action by regulators. She has seen and experienced first-hand the harm to public beaches resulting from beachfront property owners being given emergency permits to install supposedly temporary sandbag revetments, which are left in place for years or even decades, with no oversight or accountability from state or county regulators. She has observed how such shoreline reinforcement measures compromise the natural processes and integrity of the sand dunes and nearshore environment and exacerbate the erosion and loss of the public beach. She has also seen how such sandbags deteriorate, litter the beach and nearshore waters, get trapped in the reef, and impair valuable public marine resources.

Ms. Diamond has also witnessed private property owners engage in planting and propagating rows of artificial vegetation (including naupaka, heliotropes, spider lilies, and coconut trees) along the seaward edge of their property lines to reinforce the shoreline and attempt to push it further seaward. This vegetation encroaches seaward of the shoreline established by the high wash of the waves, restricting lateral access and transit along the beach and denying the public of use and enjoyment of the beach. The ongoing and escalating proliferation of sandbag and vegetation encroachment seaward of the shoreline has directly interfered with her access, use, and enjoyment of the public beach and nearshore areas.

- Presley Wann is the President and Director of MKA. His ‘ohana was part of the original hui kua‘āina that has lived in Hā‘ena since time immemorial. As a direct lineal descendant of iwi kūpuna resting in the sand dunes of Naue, he is spiritually and culturally connected to the Hā‘ena coast. He served on the Kaua‘i/Ni‘ihau Island Burial Council for seven

years and played a crucial role in the care of iwi kūpuna found in Native Hawaiian burial sites across the Islands of Kaua‘i and Ni‘ihau.

Mr. Wann is seriously concerned about the impact to iwi kūpuna if sand pushing activities and heavy equipment operating in the sand dunes along the Hā‘ena coast is allowed. He is also concerned about impacts from these activities affecting turtle nesting grounds and the nearshore habitat of other native flora and fauna along the shoreline.

Mr. Wann has a wealth of experience advising government agencies regarding cultural management practices, specifically with regard to public trust resources. He has previously served on the ‘Aha Moku Advisory Committee, which brings regional concerns from island communities forward and advises government on how to affirmatively protect and preserve Native Hawaiian rights, traditional and customary practices, and natural and cultural resources that are protected as part of the public trust. *See* HRS § 171-4.5; *see also* ‘Aha Moku Advisory Committee Final Rules of Practice and Procedure, § 1-2. He has also served on the Advisory Committee for the Marine 30x30 Initiative, which supports broad public participation and incorporates expert scientific and cultural guidance to achieve the goal of restoring abundance to Hawai‘i’s nearshore waters so that the people of Hawai‘i can enjoy our coastal waters, support local livelihoods, and feed our families.

Mr. Wann and his ‘ohana engage in fishing and gathering practices along the shoreline for subsistence and medicinal purposes, and he regularly participates in the restoration of fisheries throughout Hawai‘i, and specifically in Hā‘ena. He was instrumental in the adoption of the Hā‘ena Community-Based Subsistence Fishing Area (“CBSFA”), the first CBSFA in the

State, which is intended to protect fishing practices “customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion.” HRS § 188-22.6. The Hā‘ena CBSFA extends from the shoreline to one mile off the northwestern coast of Kaua‘i. Mr. Wann is intimately familiar with the regular migration patterns of the natural beach and nearshore marine ecosystems and how the natural processes of sand migration and the movement of marine resources are interconnected in an integrated living and dynamic system. The degradation and loss of the public beach thus impairs the broader marine ecosystem and traditional and customary Native Hawaiian rights like fishing and gathering that depend on marine resources and shoreline access. Along these lines, Mr. Wann is concerned that sand pushing and construction activities along the shoreline and in the nearshore waters will negatively affect the CBSFA and marine resources along the Hā‘ena coast.

- Lahela Keikila‘au‘o‘wakanahale Chandler Correa is a Director of MKA. She was born and raised on the Island of Kaua‘i in Wainiha Valley, where she and her ‘ohana farm kalo to provide for the families in their community. She is Native Hawaiian and is also a direct lineal descendant of the iwi kūpuna resting in the burial sands of Hā‘ena and Naue. She has serious concerns about the impact to iwi kūpuna if sand pushing activities and heavy equipment operating in the sand dunes along the Hā‘ena coast is allowed.

Mrs. Correa comes from a long line of subsistence-based fishermen. She and her ‘ohana regularly fish and gather limu, he‘e (octopus), loliloli (sea cucumber), and other marine and cultural resources along the Hā‘ena coast. The resources that she and her ‘ohana gather are shared with kūpuna and families in their community. Mrs. Correa has also been involved with a



“ma kai watch” hui of community members who document, monitor, and educate the public regarding activities occurring from the beach to the ‘āpapa (reef) along the Hā‘ena coast.

Widespread sandbag and vegetation encroachment have been an ongoing issue along the Hā‘ena shoreline and not only affects lateral access to the beach, but severely impairs the traditional and customary Native Hawaiian rights like fishing and gathering that depend on marine resources and shoreline access.

The interests of MKA and its members have and will continue to be harmed by the types of beach restoration, reinforcement, and construction activities authorized—such as sand pushing, backpassing, and bypassing, and the recovery, transport, and placement of beach compatible fill—under the proposed statewide SSBN program and permit. The activities and projects negatively affect MKA members’ ability to use and enjoy public beaches, shorelines, and nearshore resources, and to engage in traditional and customary Native Hawaiian practices. The SSBN proposal, for example, would authorize sand pushing activities above and below the high-water line with little to no oversight. *See* Conservation District Use Application for Programmatic Statewide Small Scale Beach Restoration (SSBR) Program (“CDUA”) at 20, attached hereto as Exhibit “1” and incorporated herein by reference. Such activities pose particular concerns and threats for places like the Hā‘ena sand dunes, which are known Native Hawaiian burial sites. Ground-moving activities conducted along the Hā‘ena shoreline have historically unearthed numerous iwi kūpuna and have caused substantial controversy and upset for Native Hawaiian lineal descendants and the larger north Kaua‘i community. The SSBN

proposal would rubber-stamp such activities in culturally sensitive areas like the Hā‘ena sand dunes and exacerbate these problems.

The proposed SSBN program and permit would also authorize “construction of beach stabilization structures,” which include “sand filled geotextile bags or tubes, stone filled marine mattresses, geotextile filter fabric, core stone, armor stone, steel or vinyl sheet pile, timber piles, and concrete, among others.” CDUA at 18, 22. Secondary actions included within the SSBN proposal’s authorized activities include the “[c]onstruction, installation, and removal of temporary construction-related erosion protection, including but not limited to . . . sand bag revetments” and “[p]lanting vegetation to stabilize the beach with special conditions for types of vegetation and maintenance.” *Id.* at 23. The blanket authorization of such projects and activities for fast-track processing and implementation across the state will exacerbate the problems and harms already suffered by MKA and its members. The SSBN proposal’s endorsement of sandbag revetments and other intrusive shoreline reinforcement measures will exacerbate the ongoing problem of such installations becoming a permanent fixture on beaches across the islands, including Kaua‘i’s northern coastline. Likewise, allowing the planting of vegetation in SSBN projects will exacerbate the problems with artificial vegetation encroachment and restricted lateral access along Kaua‘i’s northern coastline.

Overall, the SSBN proposal prioritizes the interests of beachfront property owners over the public trust. Rather than closing loopholes and ameliorating the ongoing lack of enforcement and failures to protect and manage public shorelines, the proposal contrarily expands the size and intensity of shoreline projects eligible for fast-track approval and implementation. This harms

the interests of MKA and its members in accessing, utilizing, and enjoying the public beach and shoreline for traditional and customary religious, cultural, and subsistence practices, as well as recreational, aesthetic, and other environmental purposes. It also severely curtails their ability to assert and protect their rights to shoreline resources guaranteed under the multiple provisions of the Hawai‘i Constitution discussed above.

As a matter of constitutional due process, MKA must be allowed an opportunity to contest the SSBN proposal, limit its harmful impacts, and ensure any SSBN program and permit complies with the law, upholds community-based principles and values, considers each beach’s unique characteristics and needs, and incorporates public and community input. MKA and its members undeniably have standing to seek to address and remedy the SSBN proposal’s impacts on their interests and rights. *See MECO*, 141 Hawai‘i at 270, 408 P.3d at 22.<sup>5</sup>

## **22. Any Disagreement Petitioner May Have with an Application before the Board**

The crux of the disagreement MKA has with the application is its failure to consider and address the potential harmful impacts that the broad and ambiguous categories of activities authorized under proposed SSBN statewide program and permit would have on constitutionally protected traditional and customary Native Hawaiian rights and public trust resources. The

---

<sup>5</sup> While DLNR’s rules refer to persons with an interest in the proceeding “clearly distinguishable from that of the general public,” HAR § 13-1-31(b)(2), the Hawai‘i Supreme Court has long rejected such a requirement, *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 70, 881 P.2d 1210, 1216 (1994), and instead, has recognized a “lower standard” for standing in cases relating to environmental and Native Hawaiian rights. *See MECO*, 141 Hawai‘i at 270, 408 P.3d at 22; *Kilakila*, 131 Hawai‘i at 205, 317 P.3d at 39. MKA and its members meet either standard.



SSBN proposal would significantly expand its authorized categories of activities to include the dredging and placement of far greater volumes of sand than before, as well as the construction of intrusive and potentially harmful beach stabilization structures such as sand-filled geotextile bags or tubes, armor stone, steel or vinyl sheet pile, and concrete; it also sanctions the use of artificial vegetation as part of the authorized projects. Moreover, the SSBN proposal significantly expands OCCL’s authority and discretion to fast-track projects and bypass the usual individualized analysis and justification that would otherwise be required to ensure the protection of shoreline resources. Of particular note, nothing in the proposal mentions or considers the need for managed retreat in response to sea-level rise; rather, the sole focus is on encouraging band-aid solutions for short-term expediency. Overall, the SSBN proposal appears to be geared toward protecting shoreline property owners, rather than the public interest in shoreline management and access over the long term.

MKA’s disagreement with the CDUA includes, without limitation, the following legal issues:

- (1) First, the proposed Conservation District Use Permit (“CDUP”) for the SSBN program fails to meet the legal requirements and criteria for such permits. These include the requirement of a determination whether the activity: (1) is consistent with statutory coastal zone management guidelines; (2) will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region; (3) are compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels; and (4) whether the environmental

aspects of the land will be preserved or improved upon. *See* HAR § 13-5-30(c). These criteria require site-specific analysis and cannot be disposed of on a programmatic, state-wide basis, particularly for the major types of activities classified under the SSBN proposal as “Category III.” Moreover, Hawai‘i statutory coastal zone management objectives and policies call for the minimization or prohibition of erosion-protection structures constructed seaward of the shoreline, which the expanded SSBN proposal disregards and contradicts.

(2) Second, the SSBN proposal runs afoul of Article XII, § 7 of the Hawai‘i Constitution, which obligates the state to protect Native Hawaiian rights. This duty requires agencies to consider (1) the identity and scope of valued resources and the exercise of Native Hawaiian rights in the affected area; (2) the extent to which the proposed action may affect or impair those resources and rights, and (3) the feasible actions to reasonably protect them. *See Ka Pa‘akai o ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 45-47, 7 P.3d 1068, 1082-1084 (2000). The SSBN proposal provided no such “*Ka Pa‘akai* analysis,” and again, the proposed blanket approval of expansive categories of projects, including beach stabilization structures, is not consistent or compatible with the site-specific nature of this constitutionally required inquiry.

(3) Third, the SSBN proposal is contrary to the state’s obligations under the public trust doctrine established under Article XI, § 1 of the Hawai‘i Constitution. Well-settled Hawai‘i law makes clear that shoreline resources are protected under the public trust, which imposes rigorous procedural and substantive duties on state agencies to protect

those resources “at every stage of the planning and decisionmaking process.” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. The expanded SSBN proposal does not comport with these trust duties.

(4) Finally, rulemaking may be advisable or required to promulgate aspects of the SSBN proposal seeking to establish a broad framework of rules, standards, and processes for categories of activities and projects. *See Aluli v. Lewin*, 73 Haw. 56, 828 P.2d 802 (1992). Such a process would allow “[a]ll interested persons . . . an opportunity to submit data, views, or arguments which are relevant to the issues” and require the Board to “consider all relevant comments and materials of record before taking final action.” *See* HAR 13-1-24.

The problems and disagreements MKA has with the application were also discussed and highlighted during the Board’s July 9, 2021 meeting. MKA submitted written testimony in strong opposition to OCCL’s CDUA, raising a variety of insights and concerns, including, for example, the need for community-based management, the scope of activities authorized under the SSBN proposal, impacts on Native Hawaiian traditional and customary rights, impacts on public trust resources, and the failure to consider managed retreat alternatives. MKA’s Executive Director Caren Diamond also attended the July 9 meeting to provide oral testimony in strong opposition to OCCL’s CDUA. MKA testified concerning the importance of prioritizing beach preservation over private property protection and articulated numerous concerns regarding the scope of activities allowed under the SSBN proposal. MKA further detailed how the types of projects that will be streamlined under the proposal are *already* wreaking havoc on Kaua‘i’s



northern coast, disrupting beach processes, and diminishing public beaches. In light of its concerns, MKA requested that the Board reject OCCL’s CDUA or significantly modify it to limit its scope and add safeguards.

The public testimony and Board discussion similarly raised concerns and objections related to shortfalls in public and stakeholder outreach related to the SSBN proposal, the expansive and ambiguous scope and impact of authorized projects, and OCCL’s open-ended discretion with respect to approvals and denials of projects. OCCL indicated its willingness to take the time to do proper public outreach and come back to the Board for further presentation. When it became clear that such community and stakeholder consultation to correct and improve the proposal would not occur, Ms. Diamond made an oral request for contested case hearing on behalf of MKA.<sup>6</sup>

### **23. Any Relief Petitioner Seeks or Deems Itself Entitled to**

MKA seeks corrections, clarifications, and modifications of the SSBN proposal that fulfill the Board’s duties and obligations to protect Native Hawaiian rights and public trust resources and promote a longer-term vision incorporating a strategy of managed retreat in response to climate change and sea-level rise. MKA seeks, and is entitled to, any and all relief necessary to remedy the legal deficiencies discussed in the previous section. Specifically, MKA

---

<sup>6</sup> MKA Executive Director Caren Diamond made the timely request for a contested case hearing in accordance with HAR 13-1-29, requiring “[a]n oral or written request for a contested case hearing . . . no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition.”

seeks to clarify and reduce the scope of the SSBN proposal to focus on truly benign and beneficial measures from a short- and long-term perspective, avoid a one-size-fits-all approach to beach restoration, and facilitate a longer-term plan and strategy for managed retreat that prioritizes the public trust over private property. Moreover, MKA seeks to include exemptions or rigorous conditions to protect highly valuable and culturally sensitive beaches, such as Hā‘ena, from any potential projects authorized under the SSBN program and permit.

#### **24. How Petitioner’s Participation in the Proceeding Would Serve the Public Interest**

MKA’s participation in this proceeding would serve the public interest by bringing MKA’s important perspective and expertise to bear on the important factual and legal issues related to the SSBN proposal, and by recognizing and upholding MKA’s constitutional rights to participate in this proceeding to that end. As discussed above, MKA members are long-standing and recognized community leaders on issues of public shoreline access and protection, with an established successful track record of engagement on these issues. MKA members are directly and personally familiar with the way beach restoration projects have been carried out for decades along the shores of Kaua‘i, and the negative impacts those projects have on public trust resources and Native Hawaiian traditional and customary practices. Not only do MKA members stand to be directly affected by the type of projects the SSBN proposal would authorize, but based on their wealth of first-hand and community-based experience over many years, they are uniquely positioned to inform this proceeding regarding the real-world, on-the-ground impacts of these types of activities, and to offer corrections and improvements to the SSBN proposal to mitigate or avoid these impacts.

State of Hawai‘i

Board of Land and Natural Resources

**PETITION FOR A CONTESTED CASE HEARING: ATTACHMENT**

Mālama Kua‘āina

July 19, 2021

Page 17

MKA can and will bring to this proceeding factual and technical information and legal insights that have been lacking in the development and discussion of the SSBN proposal. These include, for example, historical, factual, and technical background and documents, kama‘āina and expert testimony, as well as legal expertise through MKA’s counsel Earthjustice, regarding the merits of the SSBN proposal and the activities and structures it authorizes. MKA’s participation in this proceeding will thus contribute to the development of a sound record for a decision on the proposal, which is also in the public interest.