October 12, 2022

Testimony of Nā Papaʻi Wawae ʻUlaʻula to the Board of Land and Natural Resources on Item K-2 "Request for Approval to hold Statewide Public Hearings to Amend and Compile Title 13, Chapter 5, Hawaiʻi Administrative Rules regarding the Conservation District"

Aloha Chair Case and Board Members,

I am writing on behalf of Nā Papaʻi Wawae ʻUlaʻula, a nonprofit organization based on Maui. We have over 5,000 members on our associated social media platforms. Please find our comments on proposed conservation district rules under Item K-2 below.

A. Procedural concerns, particularly regarding conservation district criteria

1. Concerned community should have a voice in developing proposed rules.

We understand the Office of Conservation and Coastal Lands (OCCL) has been conducting a "comprehensive internal review of the rules" since 2018. Given the many stakeholders and high public interest, we are requesting more engagement with community groups who have sought to enforce conservation district rules but are unaware of any such engagement. For example, dozens of dedicated aloha ʻāina spent months as parties to a contested case to enforce conservation district rules against the Thirty Meter Telescope permit. These and other groups should have an opportunity to give input into the proposed rules.

Although further public hearings are part of the rule-making process, for OCCL to integrate public input and amend these rules – OCCL would have to re-start the notice and hearing process at expense to the State and its taxpayers. The public would have to endure a relatively formal process – submitting multiple copies of testimony, exhibits, and so on – at their own private expense. *See e.g.* HAR §13-1-24(e) (requiring 11 copies of exhibits, unless excused). It is more appropriate to start with a good proposal based on community concerns rather than have to amend, re-amend, and re-start the process. This would be a waste of the community's and OCCL's time and energy.

Please vote to defer this item until OCCL has consulted with community-based groups and individuals on how to improve conservation district rules.

2. Proposed conservation district permitting rules especially require further vetting and discussion

We appreciate OCCL's efforts to revamp conservation district criteria. However, the tact of making them more specific and tailored to different types of conservation districts should occur with more input from communities prior to being sent out into the formal rulemaking process.

For instance, proposed §13-5-30(d)(2)(C) and (E) addressing "Streams and Wetlands" require: "The land use will not alter the alignment or flowrate of a stream or important wetland in any way which may degrade native species habitat;" and "No grading, construction, or other land use which will likely affect stream flow will be approved within one hundred feet of the top of the stream bank or within one hundred feet of an important wetland[.]" Emphasis added.

It is unclear why only "important" wetlands are scrutinized, or why alteration of a stream or

important wetland wouldn't be an issue notwithstanding degradation of native species habitat. There are vigorous debates about how to protect and define wetlands around Hawai'i in light of sea level rise, increased flooding and drought, and other climate change impacts. The criteria could benefit from more specific engagement with these issues of defining wetlands such as the Save the Wetlands hui in Kīhei, who have helped pass bills to protect wetlands. Moreover, starting with a more restrictive criteria - i.e., "important" wetlands - narrows the discussion from the beginning rather than gathering public feedback to determine what types of wetlands should be protected before putting the rules forward.

Proposed §13-5-30(d)(3)(B) provides "The land use will not degrade an area of native-dominated vegetation or enable invasion of habitat-modifying alien species." This criterion does not adequately provide for the restoration of conservation district lands, particularly those that have been in private hands and not sufficiently cared for. The criterion should allow for consideration of seed banks and restoration potential.

Proposed §13-5-30(d)(4)(C) provides: "The land use will not alter near shore wave or current patterns over the anticipated design lifespan unless such changes are the result of a beach restoration or coastal navigation project in which modeling demonstrates such changes are not detrimental to beach processes, public recreation, marine habitat, or coral ecosystems[.]" Many of the models and data produced around shoreline impacts are of such dense material as to dissuade public review and comprehension. Historical information, kama'āina testimony, and other comparable data should be considered alongside modeling and not discounted solely on the basis of the applicant's consultant's models. Many have noted Sea Engineering Incorporated's models failed to predict changes to the historic and world-famous Waikīkī beach breaks, which are forever changed after dredging and beach restoration projects. This criterion could use further vetting to consider how modeling has been implemented in other projects of concern.

Proposed §13-5-30(d)(5)(A) provides: "The land use will not permanently interfere with public use of a public trail, access to public recreation areas, and beaches." This criterion does not allow consideration of the significant impacts of temporary interference of a periodic, seasonal, or durational nature. A land use that terminates in 50 years may permanently interfere with a generation's use of the public trail. Land uses preventing nighttime use of a trail may permanently disallow certain kinds of traditional fishing practices. The term "permanently" could be changed to "significantly" to remedy this issue in part. "Permanently" is too high of a bar to offer any meaningful protection.

Proposed §13-5-30(d)(8)(A) provides: "The land use complies with the provisions and guidelines contained in chapter 6E, HRS[.]" This criterion, as much if not more than the others, requires input from community stakeholders who have copious information about the failures of the understaffed, beleaguered State Historic Preservation Division's implementation of HRS chapter 6E in protecting historic sites and cultural resources. Here, and in all other criteria, community stakeholders could suggest further requirements, such as requiring approved preservation plans for all recorded sites and review and concurrence by all and any county cultural resources commissions.

B. <u>Coastal hazards, sea level rise, and shoreline hardening recommendations</u>

We appreciate OCCL's effort to propose rules to better address climate change and sea level rise, including more specific address to prevent nonconforming structures to persist beyond their expected life in conservation district, and the requirement of a coastal hazard mitigation disclosure statement under §13-5-39.5 and other provisions.

Proposed §13-5-35 helpfully clarifies limitations on the use of "emergency permits" for shoreline hardening structures. Many of these "temporary" and "emergency" structures include

sandbags and sand burritos. The definition of "shoreline hardening", however refers to "installation of a seawall, revetment, or other hard structure . . ." Proposed §13-5-2. This definition and/ or limitation on emergency permits should expressly include sandbags and sand burritos, which cause the same impacts as shoreline hardening. This is especially important as the community has repeatedly seen "emergency permits" issued and reissued year after year, for the same locations.

Similarly, rules newly defining the "beach" do not adequately encompass beach processes, which includes those beaches that only appear seasonally. We are seeing more extreme changes in beach formation and loss in areas near or adjacent to seawalls and in light of higher tides. Proposed §13-5-2 states:

> Beach means a coastal landform primarily composed of sand that is established and shaped by wave action and tidal processes. "Beach" includes sand deposits in nearshore submerged areas, or sand dunes or upland beach deposits landward of the shoreline."

This definition does not include seasonal beaches. Therefore, the myriad rules seeking to protect "beach process" and "lateral beach access" may have restricted application to areas that do not have sand beaches at all times. The definition should be expanded to recognize dynamic beach formation and loss.

OCCL's small scale beach nourishment environmental assessment received significant community pushback. The phrases "small scale" and "nourishment" diminish the purpose and intent of the action, which is to protect real estate. Merely adding sand to the makai end of the property does little to address what is landward of the beach. Further, the proposed rules incorrectly assume beach nourishment has been properly vetted under environmental review. It has not. Rules governing the procedure should reflect the high degree of scrutiny needed for these projects regardless of whether they involve 10,000 cubic yards (cy) of sand. The rules should also prohibit piecemealing of any such beach nourishment projects, such that an owner cannot seek successive permits for < 10,000 cy of sand additions.

Proposed §13-5-22 permits repair of shoreline hardening under submission of a site plan where the "applicant shows that the replacement or reconstruction will not adversely affect beach processes or lateral public access along the shoreline[.]" While an improvement over existing language, the replacement or reconstruction will presumptively increase the life of the shoreline hardened structure and therefore have adverse impacts. Please clarify that if the existing shoreline hardened structure is already causing adverse impacts, as determined by OCCL and not just the applicant, the applicant would have to submit for full Board approval as opposed to a site plan.

Proposed §13-5-22 also removes the requirement for shoreline certification. This may not generally be required if the shoreline hardened structure is the bulwark between the property and the ocean, but it may be possible that this is not the case where, for instance, applicants obtain beach nourishment permits. Therefore, the shoreline certification requirement should be either retained in all instances of either shoreline hardening or nourishment.

Similarly, the permit application requirements under proposed § 13-5-31 should not reduce the instances where shoreline certification is required.

Additionally, we recommend rules requiring all applicants for permitting shoreline hardened structures, repair of the same, or beach nourishment, to submit plans for managed retreat and/ or retirement of the hardened structure to occur within in the next 10 years as a standard condition of any permits or approvals. Permits for the above-mentioned should include a time limitation such that those permits may not be extended beyond ten years unless implementation of the managed retreat/ retirement plan is substantially underway. If such efforts are demonstrated to be underway, then the permits may be renewed for an additional five years if necessary to allow for the managed retreat plan/ retirement plan to be fully implemented.

C. Beneficial proposed changes and recommended additions

1. Loko iʻa standards appreciated; require fine tuning

We appreciate provisions allowing traditional loko iʻa conservation districts and to waive application fees for that purpose. However, we suggest Exhibit "7" include further "Exclusions." Certain tourism-oriented commercial operations have utilized loko iʻa simply as water features, including by encouraging recreational use of them, particularly in South Maui. Such uses are inappropriate uses of valuable resources for food and traditional customs.

2. Other beneficial proposals and recommendations.

Proposed §13-5-42 importantly prohibits transient rentals as a standard condition of any conservation district use permit.

Proposed §13-5-32 usefully authorizes the chairperson to waive filing fees for non-profits where the primary goal of the proposed project is to preserve and protect the natural or cultural resources of Hawaiʻi. This waiver should extend to community associations that may be unincorporated or fiscally sponsored by other nonprofits.

D. Substantive amendments to proposed rules needed

1. Routine actions requiring no permit should be more specific and limited §13-5-21

§13-5-21 "General actions requiring no permit" (also titled, "Routine actions") should include more specific and limited provisions.

Actions that do not require a permit should require, however, some oversight or review by OCCL. For instance, the "[r]emoval of dead or diseased trees or trees that pose a hazard to public safety; provided, however, that the landowner shall be required to provide documentation for the need to remove the trees." -21(a)(2). Additional provision requiring OCCL to review the documentation, ensuring the documentation includes photographs, letters of concern from an arborist or licensed contractor, and other specific requirements are appropriate here. Another exemption for "[b]asic data collection, research, education, and resource evaluation that is temporary and results in negligible ground disturbance" should also require non-permittees to submit a research or education plan to OCCL and for OCCL to review it for compliance with the rule. Data collection involving some ground disturbance could become more than negligible, particularly if the research involves taking samples by, for instance, coring of corals.

Merely "recommending" OCCL consultation for actions under subsection (b) creates another grey area where requiring such consultation is more appropriate. "(4) Clearing of sand from stream mouths, canals, small boat harbors, or other features for state or county maintenance, provided that the sand removed shall be placed on adjacent shoreline areas unless the placement would result in significant turbidity, as determined by the department" raises such issues.

In many places across the state such as Heʻeia and Kīhei, counties will dig out "sand plugs" to relieve flooding in low lying areas. This results in significant sedimentation on reefs. Below is a photograph of Waipuilani Gulch, Maui, on or about September 10, 2022 after the county dug out a channel prior to heavy rains, resulting in significant sediment on nearshore reef areas.

Photo credit: Vernon Kalanikau, Waipuilani Gulch, Maui, on or about September 10, 2022

Photo credit: Vernon Kalanikau, Waiohuli Gulch, Maui, on or about September 10, 2022

As proposed, the rule says "consultation" is only "recommended", but in regard to sand replacement, also includes "as determined by the department." The inconsistency may be interpreted as not requiring counties to consult or obtain a determination by OCCL prior to any action. The provision: "the sand removed shall be placed on adjacent shoreline areas unless the placement would result in significant turbidity," only addresses whether the *placement of the sand itself* will result in significant turbidity. It does not require consideration of whether the *absence of the sand* from the channel mouth will result in significant turbidity. As written, the rule appears to allow no OCCL determination if the sand is to be placed on adjacent shorelines.

The rule could be amended to include a provision addressing the *removal* of sand causing turbidity, but this would not cure the lack of required oversight. A blanket prohibition against clearing channels adjacent to the shoreline may be one way of avoiding this interpretation.

Exempting from permits: "[m]inor repair of an existing structure, facility, use, land, and equipment" should be amended such that any serialized or phased repair over 5 years that cumulatively is not "minor." This could ameliorate the tendency of applicants to evade permitting by segmenting actions to avoid regulatory scrutiny.

2. "Comprehensive" management plans should remain comprehensive.

Proposed §13-5-2 removes the term "comprehensive" from the definition of a "Comprehensive management plan" such that it means only a "plan to manage multiple uses and activities to protect and conserve natural and cultural resources." Planning for significant uses of the conservation district should be "comprehensive."

In 2007, Hawaiian and environmental activist groups successfully challenged the University of Hawai'i because its "comprehensive" management plan was not "comprehensive." The circuit court ruled the Board "erred by approving [the University's] planning documents because they 'were not comprehensive management plans designed to address long term 'cumulative land use proposals' as required by Chapter 13 of the Hawaii Administrative Rules (HAR)." Although the new definition of "comprehensive management plan" references "multiple uses", this could mean merely two kinds of uses of the conservation district. It is unclear why the term common-sense inclusion of "comprehensive" is now omitted from the definition. Its removal could lend support to an interpretation that a comprehensive management plan is no longer required to be comprehensive.

3. Management plans should retain approval requirement, not merely review.

Proposed §13-5-24 removes the requirement for Board approval of management plans for astronomy facilities, rather requiring the plan only be reviewed. Board approval is also removed for commercial forestry and mining in the resource subzone. The relatively more protective, affirmative approval of such management plans should not be removed and replaced by mere review. These are critical resources and Board approval provides an opportunity for public consideration and comment at Board hearings. This also is an apparent attempt to limit the opportunity of those whose rights are directly impacted by such uses in the conservation district to request a contested case hearing.

4. Shouldn't boundary determinations require boundary determination?

Proposed §13-5-17 titled "Boundary determinations; criteria" seeks to render an applicant's "determination of the precise boundary of the subzone with respect to the parcel in question" a

discretionary decision on the part of OCCL instead of a regular requirement of boundary determination. It is unclear what circumstances would exist such that OCCL would not want to know the precise boundary of the subzone for which they are considering a permit for use.

E. Conflicts with statutory requirements

1. Public welfare is a statutory purpose of the conservation district rules.

Please do not remove "welfare" from §13-5-1. Previous discussions of conservation district rules discussed public welfare in terms of aesthetic appreciation and the necessity of wilderness areas as a respite from the city environment. These remain part of the purpose of the conservation district and is required under statute. HRS §183C-1 provides:

> Findings and purpose. The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature 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.

Emphasis added.

2. Conservation district law appeals go to the supreme court.

"§13-5-3 Appeals" proposes orders under the rules be appealed to "the environmental court." However, HRS §183C-9 provides in relevant part:

> Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by section 91-14(a) upon the record directly to the supreme court for final decision, except for those appeals heard pursuant to this chapter arising in whole or in part from part III of chapter 205A or arising in whole or in part from chapter 115.

Emphasis added. The proposed rule should be amended to conform to HRS §183C-9.

Given the limited time to review Item K-2, Nā Papa'i Wawae 'Ula'ula is unable to provide comprehensive comments. We ask you to defer this item and request that OCCL confer with community stakeholders in preparing a new draft of the rules. Mahalo for considering our comments.

Yours,
Kai Nishiki, President Nā Papa'i Wawae 'Ula'ula