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October 28, 2022 Comments on Proposed Revisions to Chapter 13-5, Conservation District Rules

REQUESTED AMENDMENTS

I request amendment of §13-5-42, §13-222-16(b), and §13-222-17, Hawaii Administrative Rules, to require that the shoreline shall not be certified further makai after the BLNR or DLNR has approved public or private development or land uses which may relocate the “upper reaches of the wash of the waves”. And I request these requirements apply without exception to all authorizations for temporary or permanent development or land uses makai of the shoreline after the amended rules take effect.

JUSTIFICATION

It would improperly circumvent the State land use law (Chapter 205, Hawaii Revised Statutes) to certify the shoreline further makai after the BLNR or DLNR authorizes development which artificially relocates the shoreline. Neither the BLNR nor the DLNR is authorized to amend the boundaries of the State Conservation District or county zoning jurisdiction under Chapter 205, §183C-3, or §183C-4, Hawaii Revised Statutes.

It would undermine the shoreline setback law (Part III of Chapter 205A, Hawaii Revised Statutes) to certify the shoreline further makai after the BLNR or DLNR authorizes development which artificially relocates the shoreline. The purpose of shoreline setbacks is to relocate development further mauka. Certifying the shoreline further makai would allow development further makai.

Shoreline certification determines regulatory jurisdiction. All lands and waters makai of the certified shoreline are within the Conservation District under §205-2(a), Hawaii Revised Statutes, and §15-15-20(6), Hawaii Administrative Rules. The BLNR or DLNR regulate development and land use within the Conservation District under §205-(5), §183C-3, and §183C-4, Hawaii Revised Statutes. County zoning applies outside the Conservation District under §205-5(a), Hawaii Revised Statutes. And except where an unauthorized structure affects the shoreline, the certified shoreline determines the makai boundary for county shoreline setback areas under §205A-41, Hawaii Revised Statutes.

STATUTORY AUTHORITY

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
Nov 13 2022

§183C-3(3), §183C-3(6), and §205A-42(a), Hawaii Revised Statutes, together provide statutory authority for the BLNR to adopt rules which require that the shoreline shall not be certified further makai after the BLNR or DLNR has approved development or land uses which may relocate the “upper reaches of the wash of the waves”. §183C-3(3) and §183C-3(6), Hawaii Revised Statutes, authorize the BLNR to protect the public interest by adopting rules and imposing conditions for development and land uses within the Conservation District. §205A-42(a), Hawaii Revised Statutes, authorizes the BLNR to adopt rules to determine the shoreline as defined under §205A-1, Hawaii Revised Statutes. §205A-42(a) and §205A-43.6(c), Hawaii Revised Statutes, give the BLNR discretion to determine the shoreline when artificial structures affect the “upper reaches of the wash of the waves”.

DISCUSSION

According to BLNR July 9, 2021 meeting minutes, as a condition for future small scale beach restoration projects, the BLNR required that:

All private owners would be required to certify and not get a regulatory shoreline certification makai of their preconstruction shoreline....

I strongly agree. And I believe the BLNR’s condition for future small scale beach restoration projects should apply to all development makai of the shoreline which may relocate the “upper reaches of the wash of the waves”. Unfortunately, that is not the case.

§205A-42, Hawaii Revised Statutes, does not address where the shoreline should be certified after development artificially relocates the “upper reaches of the wash of the waves”. Under §205A-42(b), Hawaii Revised Statutes, and §13-222-11(a) Hawaii Administrative Rules, shoreline certification is only valid for one year “... except where the shoreline is fixed by artificial structures that have been approved by appropriate government agencies...” If

- the BLNR or DLNR authorizes development makai of the certified shoreline,
- the authorized development relocates the “upper reaches of the wash of the waves” further makai, and
- enough time passes that pre-development shoreline certification is no longer valid,

§13-222-16(b), and §13-222-17, Hawaii Administrative Rules, currently require that shoreline certification maps show the relocated post-development “upper reaches of the wash of the waves.”

The July 9, 2021 BLNR condition for small scale beach restoration projects acknowledges that development makai of the shoreline can affect where the shoreline gets certified. However, because the problem results from the existing wording of BLNR rules, it is more appropriate to address the problem by amending BLNR rules than by imposing ad hoc conditions on CDUA.

- 9) *In the event that there is a disagreement between the current or any future landowner and the Department regarding the BLNR's directions or recommended work in ENF: OA 21-54, the matter shall be brought back before the BLNR for final resolution;*
- 10) *The existing violations ENF: OA 05-50 and OA 21-54 shall be considered resolved following the Department's satisfaction with the current or any future landowner's completion of the Geotechnical and Civil Engineer's recommended work contained in their reports;*
- 11) *That in the event of failure of the current or any future landowner to comply with any order herein, the landowner shall be fined \$15,000.00 per day until the order is complied with;*
- 12) *That all directions apply to Dominis G Anderson 2009 Trust, Dominis G Anderson Trustee, and Leni A Knight individually, jointly and severally; and,*
- 13) *That in the event of failure of the current or any future landowners to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.*

MOTION

Approved as amended (Yuen, Gon) unanimous.

07.09.2021/01:29:33

ITEM K-2 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.

Sam Lemmo, Office of Conservation and Coastal Lands presented the submittal. Shelly Habel (UH Sea Grant/OCCL) provided a PowerPoint presentation on the SSBR program and available to answer questions.

Chair Case conveyed that Caren Diamond has requested a contested case and confirmed with Diamond that she was not requesting a contested case at this time while the Board is in discussion regarding the submittal and reserved her right to request a contested case after the Board votes.

Board Discussion

What is authorized under this program was discussed at length how climate change and sea level rise are affecting the shoreline. There was clarification regarding sandbag revetments not part being a part of this program. Site specific areas in relation to the different categories were clarified and who would authorize the work.

Public Testimony

Dolan Eversole, Makaala Kaaumoana, Elena Bryant, Caren Diamond, Tiare Lawrence (requested a contested case if the submittal is approved), Tamara Paltin, Francine Aarona, Kai Nishiki (requested a contested case if the submittal is approved), Jeremy Dellaseras, provided oral testimony.

Amendment

- 1) *Category 3 actions would come to the Board for final approval;*
- 2) *OHA would be consulted on Categories 1, 2 and 3;*
- 3) *All private owners would be required to certify and not get a regulatory shoreline certification makai of their preconstruction shoreline for Categories 1, 2, and 3;*
- 4) *The grounds for Staff to deny an application would include that the negative effects outweigh the benefits;*

- 5) *There would be a full written Ka Pa'akai analysis for any category 3 project;*
- 6) *Public meeting to held before coming to the Board.*

MOTION

Approved as amended (Char, Yuen) 5-Ayes, 2-Nay (Canto & Yoon)

There was a verbal request by Caren Diamond and Kai Nishiki for a contested case and was advised to follow-up in writing within 10-days.

There being no further business, Chair Case, adjourned the meeting. Recording(s) of the meeting and written testimonies received by the requested deadline can be found on-line with the submittal and available for review. Certain Items on the agenda were taken out of sequence to accommodate applicants or interest parties present.

Respectfully Submitted:

Darlene Ferreira

Darlene S. Ferreira
Land Board Secretary

Approved for Submittal:

Suzanne D. Case

Suzanne D. Case, Chairperson
Board of Land and Natural Resources
Department of Land and Natural Resources