

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources Honolulu, Hawaii 96813

August 28, 2020

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Subject: Settlement Agreement with Formosa Wealth Management for Stony Coral and Live Rock Damage Resulting from the October 02, 2018 *Formosa* Anchoring within the Kailua Bay Zone of Kona Coast Fisheries Management Area, Island of Hawai'i

Summary: This submittal requests the Board of Land and Natural Resources find that Formosa Wealth Management violated Hawaii Administrative Rules §§13-95-70 and -71 by breaking and damaging approximately 431 specimens of stony coral and approximately 14 square meters of live rock when the vessel, *Formosa*, attempted to anchor within Kailua Bay on October 02, 2018. In satisfaction of the damage to natural resources on public lands, the Division of Aquatic Resources recommends that the Board approve the proposed settlement payment from Formosa Wealth Management to the State in the amount of \$100,000 as an agreed-upon contribution to be held in trust for the purpose of coral reef management and restoration in West Hawai'i.

Date of Incident: October 02, 2018

Against: Formosa Wealth Management
Through: Norko Marine Agency Inc.: Norman Cheu
521 Ala Moana Blvd. Ste 216
Honolulu, HI 96813

Location of Incident: Within the "Kailua Bay Zone" of the Kona Coast Fisheries Management Area (FMA), GPS coordinates: (19.63493°, -155.99825°), Island of Hawai'i, Hawai'i

I. INTRODUCTION

At approximately 7:00 a.m. on October 02, 2018, the *Formosa*, a 197' foreign luxury vessel owned by Formosa Wealth Management ("FWM"), dropped anchor in an area containing stony coral and live rock within the Kailua Bay Zone of Kona Coast Fisheries Management Area ("FMA"). Photos and videos taken while the *Formosa* was anchored show the ship's anchor and chain lying on coral. The surrounding area was marked by bright white exposed coral skeleton, suggesting that the anchor chain had dragged across the reef as it rotated around the anchor. Approximately 1,050 square meters of submerged lands were impacted during this event, including fully protected stony coral and live rock.

The Division of Aquatic Resources ("DAR") recommends that the Board of Land and Natural Resources ("Board") approve the proposed settlement payment from FWM to the State in the amount of \$100,000 as an agreed-upon contribution to be held in trust for the purpose of coral reef management and restoration in West Hawai'i in satisfaction of the damage to natural resources on public lands. Should the Board accept DAR's recommendation, FWM agrees to waive its rights to contest the essential facts, to accept legal liability for the grounding, and to perform its obligations under the settlement.

II. FACTUAL BACKGROUND

In consideration of the settlement terms recommended by DAR, and for the sole purpose of this settlement agreement for the damage of marine resources, FWM agrees to the following facts and will decline to contest legal liability for the acts of its employees or agents leading to the damage caused by its vessel, the *Formosa*:

A. Formosa Wealth Management owned and controlled the *Formosa*

The *Formosa*, a 197' foreign luxury vessel, is operated as a charter vessel for vacationing people worldwide. It operates in the South Pacific, Pacific, Indian Ocean, and Asia.

At the time of the incident, the *Formosa* was owned and operated by FWM, a foreign-owned Limited Liability Partnership. In command of the *Formosa* on October 2, 2018 was Captain Nicolas Popinet. Capt. Popinet was 41 years old at the time of the incident and reported this was his first time in Kailua Bay. FWM's agent while the vessel was being operated within State of Hawai'i waters was Norman Cheu of Norko Marine Agency Inc. FWM had a cruising license for U.S. waters valid from August 31, 2018 through August 30, 2019.

B. The October 02, 2018 incident

On October 02, 2018, at approximately 7:00 a.m., the *Formosa* dropped anchor in an area containing stony coral and live rock within the Kailua Bay Zone of Kona Coast FMA. Employees of Big Island Watersports observed and documented, by video recording, that the

Formosa's anchor was not properly set and the presence of recently damaged coral in the immediate area of the anchor. At approximately 2:30 p.m., DAR was made aware of the incident by employees of Atlantis Submarine who also witnessed and documented the location of the damage to the stony coral and live rock caused by the *Formosa's* anchor chain. Later that afternoon, the *Formosa* was observed by DAR staff moving to re-anchor in deeper water. DAR confirmed the new anchorage was in sand and secure. The *Formosa's* crew was cooperative with DAR in this effort.

Capt. Popinet relied on the Pacific Islands Pilot Volume 3 when making his decision to anchor the *Formosa* in Kailua Bay. The Pacific Islands Pilot erroneously states that in Kailua Bay:

“Anchorage may be obtained in depths from 13 to 30 m, clear of the numerous moorings for boats. **The bottom is sand** and the anchorage is unsafe during winds between S and W.” (emphasis added by author).

The Pacific Islands Pilot is published by the United Kingdom Hydrographic Office and is a source of information upon which many vessel pilots rely, despite containing erroneous information in this instance.

The staff from Atlantis Submarine provided written statements to Division of Conservation and Resource Enforcement (“DOCARE”). This event prompted DOCARE to conduct an investigation into the cause and extent of the damage. Capt. Popinet was cited by DOCARE for a violation of Hawaii Administrative Rules (“HAR”) Title 13, Chapter 95, Sections 70 as a result of the investigation.

C. Ecological assessment of habitat damage and efforts to mitigate damage

DAR biologists and technicians conducted two investigative surveys and two mitigation dives over a series of three site visits to the *Formosa's* anchoring sites. On October 03, 2018, the first survey was conducted at the *Formosa's* second anchoring site to confirm the *Formosa's* proper anchorage and reduce the likelihood of further damage to natural resources on public land.

DAR staff conducted its second survey at the initial anchoring site, using the coordinates provided by Atlantis Submarine staff. DAR staff measured the damaged area at 1,050 square meters. DAR staff documented the species and number of coral specimens damaged and created a photographic record of the damage caused by the attempted anchoring.

DAR staff conducted another dive at this site to reposition damaged coral colonies into an upright and stable position with live coral tissue facing upwards to mitigate the damage. A follow-up dive was conducted to cement coral fragments in place.

D. Habitat damage quantification

1. Coral

During the assessment survey, 371 coral colonies of five species of stony corals (Genus *Montipora* (10), *Porites lobata* (316), *Porites compressa* (40), *Porites evermanni* (3), and *Porites rus* (2)) were documented by survey teams as being broken or damaged. Finger coral beds, *P. compressa*, were decimated in the area due to their fragile skeletal structure. The 40 colonies scored were estimated to cover a total reef area of 460 square meters, with thousands of branches broken and overturned. Eighteen of the 40 *P. compressa* colonies were large beds, ranging in size from 1 – 25 square meters. This species is of particular ecological importance because of its role as critical recruitment habitat for numerous species of reef fish.

DAR estimates that total damages to all stony coral species covered an area of 630 square meters (60% of the 1,050 square meters of affected reef area). The affected area had an estimated 50-70% rate of live coral coverage, an unusually high rate for West Hawai‘i.

2. Live Rock

The total area of submerged lands impacted by the event was measured to be 1,050 square meters. The amount of live rock impacted by the event was conservatively estimated to be 14 square meters.

III. LEGAL AUTHORITY FOR ENFORCEMENT

A. Statutory and regulatory protection of stony coral and live rock

Stony coral and live rock are protected by HAR Title 13, Chapter 95, Sections 70 and 71.

HAR §13-95-70(a)(1) states in relevant part that “it is unlawful for any person to take, break, or damage any stony coral.”

“Stony coral” is defined as “any invertebrate species belonging to the Order Scleractinia, characterized by having a hard, calcareous skeleton, that are native to the Hawaiian islands.” HAR §13-95-1.

HAR §13-95-71(a)(1) states in relevant part that “it is unlawful for any person to take, break, or damage any live rock.”

“Live rock” is defined as “any natural hard substrate to which marine life is visibly attached or affixed.” HAR §13-95-1.

“Break” means “to hit with, or to apply sufficient force to reduce to smaller pieces or to crack without actually separating into pieces.” HAR §13-95-1 (emphasis added).

“Damage” means “to scrape, smother, poison, or otherwise cause any physical or physiological harm to the living portion of a stony coral or live rock.” Id. (emphasis added).

B. Administrative fines and costs authorized for violations of HAR Title 13, Chapter 95

HRS §187A-12.5(c) provides the administrative penalties for violations relating to aquatic resources, including HAR §§ 13-95-70 and -71 (stony coral and live rock), as follows:

(1) For a first violation, a fine of not more than \$1,000; (2) For a second violation within five years of a previous violation, a fine of not more than \$2,000; and (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$3,000.

HRS §187A-12.5(e) also provides that “[i]n addition to subsection (c), a fine of up to \$1,000 may be levied for each specimen of all other aquatic life taken, killed, or injured in violation of subtitle 5 of title 12 or any rule adopted thereunder.” The definition of “aquatic life” includes coral as well as all the sessile plant and animal species that are attached to live rock. See HRS §187A-1.

HAR §13-95-2(b)(4) provides that for colonial stony corals, such as the colonies damaged in the grounding event, per specimen fines may be imposed on the basis of each damaged head or colony less than one square meter in surface area or, for a colony greater than one square meter in surface area, each square meter of colony surface area and any fraction remaining constituting an additional specimen.

HAR §13-95-2(b)(5) provides that for live rocks, per specimen fines may be imposed on the basis of each individual live rock or, if the violation involves greater than one square meter of bottom area, each square meter of live rock.

Additionally, HRS §187A-12.5(a) authorizes the Board “to recover administrative fees and costs... or payment for damages or for the cost to correct damages resulting from a violation of” the statutes and rules pertaining to aquatic resources.

C. Settlement authority

Pursuant to HRS §171-7, it is a general duty of the Board to “recover money due the State for damage done to any public lands by wrongful entry and occupation or by wrongful removal therefrom or destruction of any property.” Further, DLNR has inherent authority to accept moneys for the purpose of implementing its functions. These monies may be placed into a trust fund and designated for certain purposes, provided that the terms that establish the trust are not illegal.

**IV. APPLICATION OF LAW AND RECOMMENDED SETTLEMENT PURSUANT TO
CIRCUMSTANTIAL FACTORS AND DAR STAFF'S SETTLEMENT DISCUSSIONS WITH THE
RESPONSIBLE PARTY**

A. Factors to be considered in assessing fines

The Board has broad discretion in assessing administrative fines for a natural resource violation. In 2014, the Board adopted an Administrative Sanctions Schedule to facilitate the standardization of enforcement for violations of aquatic resource laws. This schedule recommends a standard fine of \$200 per specimen taken.¹ The Board may also consider the value of the resources damaged, so per specimen fines may be increased or decreased accordingly.²

B. Calculation of fines

A fine of \$1,000 is imposed for a first violation of HAR §13-95-70 (damage to stony coral). An additional \$1,000 fine is imposed for a first violation of HAR § 13-95-71 (damage to live rock). Per specimen fines are calculated by applying the standard \$200 per specimen fine for each of the coral and live rock specimens damaged or broken, with a higher \$1,000 per specimen fine for each of the larger (≥ 1 square meter) *Porites compressa* colonies damaged or broken. For these larger colonies, each square meter of colony surface area constitutes one specimen. On this basis, the total fine is calculated to be **\$153,400**, as shown in **Table 1**, below.

¹ Item 2-4. Category 4 Violations – Unlawful Extractive Activity.

- (b) A person commits a category 4 violation if he or she violates any of the following provisions:
 - (4) Rules adopted under HAR Title 13, Subtitle 4, Part V, relating to the unlawful take, possession, or sale of protected marine fisheries resources;
- (c) For category 4 violations, except as provided in Items 2-4(d) and (e), below, administrative fines shall be imposed as follows:
 - (1) For a first category 4 violation, an administrative fine of up to \$200 per specimen shall be assessed...

² See HAW. ADMIN. R. §13-1-70

Table 1. Calculation of fines for stony coral and live rock damage.

Violation	Rule	Number of Violations	Fine Per Violation	Total Fine
Stony coral damage	HAR §13-95-70	1 (first violation)	\$1,000	\$1,000
Live rock damage	HAR §13-95-71	1 (first violation)	\$1,000	\$1,000
Species/Resource Damaged	Morphology	Number of Specimens Damaged	Fine Per Specimen	Total Fine
Yellow mound coral (<i>Porites lobata</i>):	Massive	316	\$200	\$63,200
Finger coral (<i>Porites compressa</i>):	Branching	1 (5m x 5m) = 25 m ²	\$1,000	\$25,000
	Branching	1 (5m x 3m) = 15 m ²	\$1,000	\$15,000
	Branching	2 (3m x 3m) = 18 m ²	\$1,000	\$18,000
	Branching	2 (2m x 2m) = 8 m ²	\$1,000	\$8,000
	Branching	12 (1m x 1m) = 12 m ²	\$1,000	\$12,000
	Branching	22 (<1 m ²) = 22	\$200	\$4,400
Smooth mound coral (<i>Porites evermanni</i>):	Massive	3	\$200	\$600
Plate-and-pillar coral (<i>Porites rus</i>):	Plate-like	2	\$200	\$400
Rice coral (Genus <i>Montipora</i>):	Encrusting	10	\$200	\$2,000
Total coral		431 coral specimens		\$148,600
Live rock		14 m ²	\$200	\$2,800
TOTAL FINE				\$153,400

C. Cost of Investigation

DAR staff spent a total of 48.0 hours investigating and processing the violation. Pacific Cooperative Studies Unit (“PCSU”) staff spent a total of 68.0 hours investigating and processing the violation. Staff time was carefully tracked using a distinct accounting code on employee time sheets. The total cost of this staff time was \$2,533.84. Operational costs and materials: two boat days to the site for surveys and damage mitigation; fuel; filling SCUBA tanks; marine epoxy, gloves, and tools totaled \$2,589.78. The total administrative cost incurred by the DAR in investigating and processing this incident was **\$5,123.62**, as shown in **Table 2**, below .

Table 2. Staff hours and costs for *Formosa* marine injury assessments.

DAR Kona Response Expenses: <i>Formosa</i> Anchoring			
<i>STAFF COSTS</i>			
Dive surveys, coral remediation			
Team	Hours	Rate*	Amount
DAR Staff	32	Mean \$25.61/hr	\$819.52
PCSU Staff	56	Mean \$18.38/hr	\$1,029.28
TOTAL			\$1,848.80
Reporting and follow-up			
Team	Hours	Rate*	Amount
DAR Staff	16	Mean \$25.97/hr	\$415.52
PCSU Staff	12	Mean \$22.46/hr	\$269.52
TOTAL			\$685.04
Subtotal staff costs			\$2,533.84
<i>OPERATIONS</i>			
Item	Qty	Rate	Amount
Boat time	2 days	\$1040/day	\$2,080.00
Fuel	2 days	12 gal/day @ \$4.50/gal	\$108.00
TOTAL			\$2,188.00
<i>MATERIALS</i>			
Item	Qty	Rate	Amount
Tanks	32	\$8.50	\$272.00
Marine epoxy	2 kits	\$52.89	\$105.78
Gloves (each)	1	\$8.00	\$8.00
Tools (each)	4	\$4.00	\$16.00
TOTAL			\$401.78
Subtotal operational costs			\$2,533.84
TOTAL EXPENSES			\$5,123.62

D. Recommended settlement

DAR recognizes that prosecution of an *in rem* claim against the *Formosa*, in particular perfecting jurisdiction, is a difficult prospect. This is further complicated by the involvement of a foreign flag. Notwithstanding these issues, FWM remains willing to compromise and settle this matter for what they believe is a reasonable, and significant, amount.

FWM and the State have agreed to a proposed settlement whereby FWM will make a contribution of \$100,000 to compensate the State for the habitat damaged in the incident and to cover the State's associated administrative costs. The funds will be held in trust for the purpose of coral reef management and restoration in West Hawai'i. Based on the considerations outlined above, DAR recommends that the Board approve the proposed settlement.

V. RECOMMENDATIONS

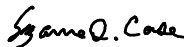
1. That the Board find that Formosa Wealth Management violated HAR §§13-95-70 and -71 when its vessel, the *Formosa*, deployed its anchor within the Kailua Bay Zone of Kona Coast Fisheries Management Area on October 02, 2018 and damaged approximately 431 coral specimens and 14 square meters of live rock; and
2. That the Board approve the proposed settlement payment from Formosa Wealth Management to the State in the amount of \$100,000 as an agreed-upon contribution to be held in trust for the purpose of coral reef management and restoration in West Hawai'i, to be paid in full within 30 days of the date of this submittal; and
3. That the Board delegate to the Chairperson or her designee its authority to execute all necessary documents to carry out its recommendations under this submittal.

Respectfully Submitted,



Brian J. Neilson, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



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