

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawai'i

October 22, 2021

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, HI

SUBJECT: Denial of Petition for Contested Case Hearing filed on October 6, 2021 by Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki, regarding the Renewal of Commercial Use Permits for Hawaiian Rafting Adventures Inc., Lahaina Harbor Water Taxi Inc., and Underwater Safari, Inc. for Mala Launch Ramp, Maui.

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities.

SUMMARY:

Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki (hereinafter "Petitioners") collectively filed a contested case hearing (CCH) petition on October 6, 2021 regarding renewal of commercial use permits (CUPs) for various commercial operators using the Mala boat launch ramp. The Division of Boating and Ocean Recreation (DOBOR) recommends that the Board of Land and Natural Resources (Board) deny the petition because Petitioners have not shown that they are entitled to a contested case hearing.

BACKGROUND:

DOBOR's jurisdiction includes issuing CUPs for companies and individuals wishing to operate commercially in state ocean waters. Pursuant to Hawaii Administrative Rules (HAR) § 13-231-67, DOBOR may issue CUPs without the need for Board approval. CUPs are valid for up to one year and may be renewed indefinitely as long as the permittee is current on all fees and charges owed to DOBOR, has met minimum gross receipt requirements as defined in HAR § 13-231-61, and is not in violation of any rules or laws of the Department.

Petitioners filed a CCH petition regarding the renewal of CUPs for three commercial operators using the Mala boat launch ramp: Hawaiian Rafting Adventures Inc., Lahaina Harbor Water Taxi Inc., and Underwater Safari, Inc. (the petition is attached as **EXHIBIT A**). The CUPs for these three operators are set to expire on October 31, 2021.

The CCH petition alleges the following claims:

1. Petitioners cannot use the Mala boat launch ramp to launch their boats for traditional and customary fishing and canoe paddling, and to conduct nearshore gathering due to "excessive permitted commercial activity."
2. The public parking lot is full of commercial customers.
3. Commercial activities and unsafe sunscreens contribute to ocean pollution.

Petitioners seek a CCH for the purpose of "[adjudicating] the rights and interests of Petitioners with respect to the issuance of new permits." Petitioners' desired relief include: denial of Mala boat launch ramp CUPs, improvements to commercial operations, increased training requirements, requiring use of reef-safe sunscreens, and limiting the number of launches or commercial customers.

DISCUSSION:

The basis of Petitioners' claims is the alleged overuse of the Mala boat launch ramp for commercial purposes. HAR § 13-231-67(d) limits the number of CUPs that can be issued for commercial use of the Mala launch ramp. This rule was adopted in 1994 and amended in 2014 in order to limit the number of commercial permits allowed from DOBOR launch ramps. The rule is presumed legal and valid because it was adopted and amended pursuant to the procedures required by Hawaii Revised Statutes § 91-3. "Generally, administrative rules and regulations promulgated pursuant to statutory authority have the force and effect of law." *State v. Kimball*, 54 Haw. 83, 89, 503 P.2d 176, 180 (1972). A CCH cannot be used to challenge the validity of an administrative rule. See *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 239, 287 P.3d 129, 140 (2012) ("In a declaratory judgment action challenging the validity of administrative rules, [t]he court shall declare the rule invalid if it finds that it violates . . . statutory provisions, or exceeds the statutory authority of the agency.").

Land based activities, such as overcrowded parking lots, cannot be addressed by the regulation of ocean activities. See *Young v. Coloma-Agaran*, 2001 WL 1677259, 2002 A.M.C. 1114 (D. Haw. 2001) (finding a DOBOR rule banning commercial vessels on the Hanalei River or Hanalei Bay ocean waters, which was adopted in order to control a proliferation of tourism, unconstitutional under the Commerce Clause and the Supremacy Clause of the United States Constitution), *aff'd* 340 F.3d 1053 (9th Cir. 2003).

These concerns must be -- and are being -- addressed by other means. For example, a Mala Working Group is being formed to address various community concerns. DOBOR has also requested that its commercial permittees ask their customers not park

in the facility. Moreover, work to reconfigure the area to create additional parking has already begun and is anticipated to be completed within the next year.

Petitioners claim that commercial permittees monopolize Mala boat launch ramp by having customers sign contracts and obtain safety instructions while on the ramp. DOBOR will address this allegation directly with commercial permittees and reiterate that there is a thirty (30) minute time limit for use of the loading dock, as well as remind them that these types of business activities need to take place offsite. DOBOR will also make this a condition of the permit, the violation of which may result in an administrative enforcement action if necessary to ensure compliance.

Petitioners claim that there are no "corresponding or reasonable benefits and returns to the public" as is required for the issuance of a DOBOR CUP. See HAR § 13-251-33. To the contrary, encouraging commercial use of State boating facilities will bring economic returns to the State, which is a public benefit. Also, allowing a limited number of CUPs affords ocean recreation opportunities to the general public who otherwise may not have access to the State's ocean waters.

Pursuant to HAR § 13-1-29.1, the Board may deny a CCH petition when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling them to a CCH. Staff therefore recommends that the Board deny the CCH petition pursuant to HAR § 13-1-29.1 for the reasons stated above.

RECOMMENDATION:

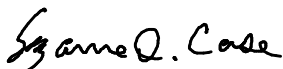
1. That the Board deny the contested case hearing petition by Petitioners, pursuant to HAR § 13-1-29.1; and
2. That the Board authorize the Chairperson to take any and all actions necessary to effectuate its decision.

Respectfully Submitted,



EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachment:

- A. October 6, 2021 Contested Case Hearing Petition by Ka Malu O Kahālāwai,
Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki

Law Office of Christina Lizzi, LLC
Christina Lizzi #10964
62 N. Market St. Suite 309
Wailuku, HI 96793
(808) 633-3966
christina@lizzi.law

DIVISION OF BOATING AND OCEAN RECREATION
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In re Applications of)	
	)	PETITIONERS KA MALU O KAHĀLĀWAI,
	)	NĀ PAPA'I WAWAE 'ULA'ULA, KEKAI
HAWAIIAN RAFTING ADVENTURES	)	KEAHI, AND KAI NISHIKI'S PETITION
INC, under Permit Nos. 20-43171/MALA 04	)	FOR CONTESTED CASE HEARING ON
and 20-43171/MALA 05; LAHAINA	)	COMMERCIAL USE PERMITS
HARBOR WATER TAXI under Permit No.	)	APPLICATIONS FOR USE OF MALA
20-38191/MALA 06; and UNDERWATER	)	WHARF AND RAMP; DECLARATION OF
SAFARI, INC, under Permit No. 20-	)	KEKAI KEAHI; DECLARATION OF KAI
38199/MALA 20; for Commercial Use Permits	)	NISHIKI; REQUEST FOR WAIVER OF
to utilize Mala Wharf and Ramp, at Mala Wharf	)	CONTESTED CASE FILING FEE
Road, Lahaina, Hawai'i on the Island of Maui,)	
TMK No. (2) 4-5-5:003)	

PETITIONERS KA MALU O KAHĀLĀWAI NĀ PAPA'I WAWAE 'ULA'ULA, KEKAI KEAHI,
AND KAI NISHIKI'S PETITION FOR CONTESTED CASE HEARING ON COMMERCIAL
USE PERMITS APPLICATIONS FOR USE OF MALA WHARF AND RAMP

KA MALU O KAHĀLĀWAI, a domestic non-profit corporation, NĀ PAPA'I WAWAE 'ULA'ULA, an unincorporated association, KEKAI KEAHI, individual, and KAI NISHIKI, individual, by and through their undersigned counsel, hereby petition the Administrator of the Division of Boating and Ocean Recreation, Department of Land and Natural Resources to hold a contested case hearing on any applications for commercial use permits for Commercial Use Permits to utilize Mala Wharf and Ramp, at Mala Wharf Road, Lahaina, Hawai'i on the Island of Maui, TMK No. (2) 4-5-5:003 (Mala wharf CUPs or Mala wharf permits) pursuant to Hawai'i Administrative Rules (HAR) §13-1-31 from Applicants HAWAIIAN RAFTING ADVENTURES INC, being the same entity and use currently operating under Permit Nos. 20-43171/MALA 04 and 20-43171/MALA 05; LAHAINA HARBOR WATER TAXI being the same entity and use currently operating under Permit No. 20-38191/MALA 06; and UNDERWATER SAFARI, INC, being the same entity and use currently operating under Permit No. 20-38199/MALA 20 (collectively, the

“Mala Wharf CUPs”).

Upon information and belief, the Mala Wharf CUPs will expire on October 31, 2021 or thereafter. New permits should not be issued unless and until Petitioners are afforded an opportunity to protect their rights through contested case hearings as defined by Hawai‘i Revised Statutes (HRS) § 91-1 and to provide information to assist decisionmakers in protecting those rights.

I. PETITIONERS’ INTERESTS IMPACTED BY PERMITS

Petitioner Ka Malu o Kahālāwai is organized to protect the natural and cultural history and resources of Kahoma and surrounding ahupua‘a from mauka to makai. Ka Malu o Kahālāwai officers, members and supporters conduct traditional and customary practices of fishing, surfing, canoe paddling, and diving in nearshore areas and also pelagic fishing.

Petitioner Nā Papa‘i Waewae ‘Ula‘ula (“Nā Papa‘i”) is an unincorporated association of West Maui residents and other beach users who are concerned about protecting and preserving the quality of life and environment for West Maui communities particularly as it relates to the public’s use and access of our coastlines. Nā Papa‘i holds in-person community meetings with West Maui communities and administers a social media page on facebook.com called, “Access Denied!” which group has over 4,700 members.

Petitioners’ officers and supporters, including Petitioner officer representative for Ka Malu o Kahālāwai, are Kānaka Maoli traditional and customary practitioners who utilize Mala Wharf to launch boats to conduct subsistence and customary fishing practices and to teach younger generations to do the same. HRS § 7-1. These practices are protected by section XII, art. 7 of the Hawai‘i State Constitution. Petitioners also include many who live in the vicinity of Mala Wharf and utilize it regularly for recreational purposes as well as traditional and customary practices. Petitioners’ officers and supporters also conduct traditional and customary nearshore gathering and canoe paddling in waters that are overrun by commercial boating activity from Mala wharf and affected by pollution from commercial boating operations.

Petitioners’ officers and supporters have been unable to access public parking spaces at and near to Mala wharf due to the excessive permitted commercial activity. Petitioners’ officers and supporters have been unable to use Mala wharf areas to launch boats to conduct traditional and customary practices due to excessive permitted commercial activity.

Petitioners’ officers and supporters have been thwarted in their ability to conduct nearshore gathering and canoe paddling due to the excessive commercial boating activity proceeding from

Mala wharf. Their ability to conduct traditional and customary practices is also compromised by increasing water pollution. Petitioners' Hawaiian traditional and customary rights are obligated to be protected under article XII, §7 of the Hawai'i Constitution. *See Ka Pa'akai o Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

Petitioners' officers and supporters are persons with rights to a clean and healthy environment, as defined by Haw. Rev. Stat. Chap. 200 and administrative regulations promulgated thereunder, which includes regulation of the environs used by commercial use permittees launching from Mala wharf and ramp. Hawai'i const. art. XI, §9. The Mala wharf permit applications primarily concern commercial uses of Maui ocean waters for scuba diving, whale watching tours, and other tourist-oriented activities. These activities bring crowds that monopolize public parking, ramp access, and otherwise disturb traditional and customary fishing practices by adding to tourism traffic in the area. Petitioners' officers and supporters have been prevented from accessing boat ramps necessary to enter the ocean safely.

Mala wharf permit operations include the use of ocean-going vehicles that may lack restroom facilities. Customers of these operations include tourists from areas that lack regulations requiring reef-safe sunscreen and who are not educated in Hawai'i regulations such that they purchase unsafe sunscreens that remain available for sale. The operations and their users increase noise levels in otherwise relatively quiet ocean spaces. These polluting activities compromise and degrade ocean water resources.

Petitioners' interests – as native Hawaiians whose traditional and customary practices are impacted, as those who have a constitutional right to a clean and healthful environment defined by the laws regulating the resource, and those who are beneficiaries of the public trust – mandate that contested case be held prior to issuance or renewal of commercial use permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari. “Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled.” 77 Hawai'i 64, *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210, 1214 (1994). Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari applications for commercial use permits pursuant to HAR § 13-231-61 at Mala Wharf adversely affects Petitioners' constitutionally protected rights under article XII, § 7 and article XI, § 9 of the Hawai'i State Constitution, mandating a hearing. DOBOR may not deny Petitioners' request for a contested case on the basis that Petitioners do “not have a legal right, duty, or privilege entitling one to a contested case proceeding.” HAR § 13-

1-29.1. Rather, Petitioners property interests entitle them to be admitted as parties to a contested case pursuant to HAR § 13-1-31(b)(2).

i. Article XII, Section 7 of the Hawai'i State Constitution

Article XI, § 7 of the Hawai'i Constitution states that: “[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian island prior to 1778, subject to the right of the State to regulate such rights.”

Petitioners include those who are descended from the aboriginal people that inhabited the Hawaiian Islands in 1778. Petitioners include those who engage in traditional and customary practices in and around Mala Wharf, including fishing, canoe paddling, diving, and pelagic fishing, and who teach future generations to do the same. *See* Declaration of Kekai Keahi (“Keahi Decl.”) ¶¶ 4-7; Declaration of Kai Nishjki (“Nishiki Decl.”) ¶¶ 6-12. As stated, due to excessive commercial activity, Petitioners’ ability to conduct these traditional and customary practices has been diminished at Mala Wharf. Issuance of commercial use permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari, without any protections afforded to Petitioners, will result in the continued diminishment of Petitioners’ article XII, § 7 rights.

For example, due to excessive commercial activity, Kekai Keahi has not been able to conduct his family’s traditional and customary practice of ‘ōpelu māmā. Keahi Decl. ¶ 16. This practice involves training a barracuda to “round up the ‘ōpelu.” Keahi Decl. ¶ 12-13. Commercial activity “scared away the opelu schools.” Keahi Decl. ¶ 16. Commercial activity also negatively impacts a traditional fishing ko‘a located off of Mala wharf by scaring away fish. Keahi Decl. ¶ 18.

ii. Article XI, Section 9 of the Hawaii State Constitution

Petitioners are also entitled to procedural due process based upon their substantive right to a clean and healthful environment. *See In re Mani Elec. Co., Ltd.*, 408 P.3d 1, 12-13 (2017) (“‘The right to a clean and healthful environment’ is a substantive right guaranteed to each person by article XI, section 9 of the Hawai'i Constitution.”). Article XI, § 9 of the Hawai'i State Constitution provides: “[e]ach person has the 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.” This right is defined in relation to existing laws related to environmental quality. *Id.* 408 P.3d at 13.

The regulations and laws authorizing issuance of commercial use permits relate to environmental quality. Commercial use permits are required for commercial use of State ocean

waters pursuant to HAR § 13-231-61. Applicants must also comply with all provisions of HAR §§ 13-231-50 to 13-231-70, and all other applicable boating regulations. DOBOR's regulations implement BLNR's "primary responsibility for administering the ocean recreation and coastal areas programs and performing the functions heretofore performed by the department of transportation and the department of public safety in the areas of boating safety, conservation, search and rescue, and security of small boat harbor environs." HRS § 200-2(a) (emphasis added); *see* HAR § 12-231-61 (implementing authorities). Further, they implement the BLNR's function to "assist in abating air, water, and noise pollution," HRS § 200-3(8). Pursuant to HRS § 200-4, these regulations are also in place to "to prevent discharge or throwing into small boat harbors, launching ramps, other boating facilities, ocean waters, and navigable streams, of rubbish, refuse, garbage or other substances likely to affect the quality of water," or that make such waters and facilities "unsightly, unhealthful, or unclean." *See* HRS §§ 200-4(a)(6), (6)(A)(i). Commercial use permittees must comply with regulations that are intended "to prevent the escape of fuel or other oils or substances into the waters in, near, or affecting small boat harbors, launching ramps, or other boating facilities and the ocean waters. . . from any source point, including but not limited to any vessel or from pipes or storage tanks upon land." *See* HRS §§ 200-4(a)(6), (6)(A)(i). The commercial use regulations thus are in place to, in part, regulate the impact of commercial uses on environmental quality. Petitioners' thus have a protected property interest in their right to a clean and healthful environment, as defined by HRS Chapter 200 and administrative regulations governing commercial use of state waters.

Issuance of permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari contributes to ongoing degradation of environmental quality, which harms Petitioners' right to a clean and healthful environment.

iii. Due Process Requires a Contested Case Hearing

"Procedural due process 'requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues.'" *Application of Hawai'i Elect. Light Co.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984). To determine what procedures due process demands, courts consider: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Protect & Pres. Kaboma Ahupua'a Ass'n v. Maui Planning Comm'n*, SCWC-15-0000478, at *23 (June 16, 2021) (citation omitted).

As stated, Petitioners' have constitutionally protected interests in the exercise of traditional

and customary rights at Mala Wharf, as well as protected interested in their right to a clean and healthful environment that are impacted by the issuance of permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari.

The risk of an erroneous deprivation of these rights is high. Petitioners' have no other means to comment on or be consulted with regarding issuances of the permits, which are administratively approved. Petitioners' ability to conduct traditional and customary practices at Mala Wharf and right to a clean and healthful environment have been and will continue to be negatively impacted absent a contested case.

Agencies are obligated "to protect reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *Ka Pa'akai O Kaaina v. Land Use Commission*, 94 Hawai'i 31, 35, 7 P.3d 1068, 1072 (citing *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("PASH"), 79 Hawai'i 425, 250 n. 43, 903 P.2d 1246, 1271 n. 43 (1995)). As part of that duty, agencies must independently consider the effects of their decisions on traditional and customary practices. *Ka Pa'akai*, 94 Hawai'i at 46, 7 P.3d at 1083. A contested case hearing would enable Petitioners to provide DOBOR with information about the impacts of the issuance of commercial use permits on Petitioners' practices and assist the State with conducting the required balancing to protect Petitioners' native Hawaiian rights. Petitioners can provide information about the traditional and customary practices that underlie those rights, how they are affected, and how they may be feasibly protected. With this information, DOBOR could tailor permit conditions consistent with their public trust duties to protect the exercise of Petitioners' traditional and customary rights.

Additionally, the State's marine waters and submerged lands are held in public trust, and "are subject to the State's constitutional and common-law public trust duties." *Umberger v. Dep't of Land & Natural Res.*, 403 P.3d 277, 298 (2017). An "agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution." *In re Application of Gas Co.*, 147 Hawai'i at 207, 465 P.3d at 654. The State is thus "obligated to manage and preserve" the waters in and around Mala Wharf "[f]or the benefit of present and future generations[.]" *Haleakala v. Bd. of Land and Natural Resources*, 131 Haw. 193, 317 P.3d 27, 46 (2013) (Acoba, J., concurring). (quoting Haw. const. Art. XI, § 1). Issuance of permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari impacts ocean waters. Thus, a contested case would also assist the State to uphold its obligations as a fiduciary of this public trust resources.

II. DISAGREEMENT WITH APPLICATIONS

Commercial use permits for use of Mala wharf are not “allowed without corresponding and reasonable benefits and returns to the public.” HAR §13-251-33(a). Mala wharf CUPs have not brought corresponding or reasonable benefits and returns to the public, but rather exclude public use of Mala wharf and ramp. These negative impacts must be weighed when determining whether financial returns to the State and benefits to those who patronize the companies constitute “corresponding or reasonable benefits and returns to the public.”

Petitioners also disagree with the Mala wharf CUPs because the conditions imposed do not feasibly protect Kānaka maoli traditional and customary practices that are affected by these commercial operations at Mala wharf. Permittees are using multiple affiliations to gain additional permits.

III. RELIEF SOUGHT

Petitioners seek relief in a contested case hearing that will adjudicate the rights and interests of Petitioners with respect to the issuance of new permits to Hawaiian Rafting Adventures, Lahaina Harbor Water Taxi, and Underwater Safari. Due process requires DOBOR to observe the following procedures: (1) refrain from granting Mala wharf permit applications or allowing extensions of prior permits; (2) hold a contested case hearing on the impact of these permitting activities on Petitioners’ rights and interests; (3) enter findings on Petitioners’ rights and interests, the impact of permitted activities on those rights, and develop feasible protections against those impacts.

Such relief could include denial of the permits, required improvements to commercial operations to prevent pollution, increased training requirements for customers and employees to less impact to natural and cultural resources, requiring personnel and customers use provided reef-safe sunscreens, limiting the number of launches or patrons. As one example, employees and customers of the Mala wharf permittees take up more than a reasonable amount of public parking, and sometimes take all of the vehicular parking. These commercial users should be required to institute a shuttle for their employees and customers so that they can park in areas with more available space and leave a reasonable amount of parking for the public, including Petitioners’ officers and supporters.

Relief could also be provided through more effective enforcement measures at Mala Wharf. Mala wharf permittees also monopolize the boat ramp for excessive periods of time, often because these permittees are still engaged in ensuring their customers sign contracts and obtain safety

instruction. These activities should occur in areas away from boat ramp traffic. No one enforces the length of time allowed on the ramp. Petitioners' officers and supporters have been unable to launch their boats or have had to wait an excessive amount of time and cut short their gathering practices.

IV. PETITIONERS' CONTESTED CASE SERVES THE PUBLIC INTEREST

Petitioners' participation in a contested case would serve to vindicate public interest in public use of Mala wharf and ramp. Petitioners seek relief that would protect the public's ability to use Mala wharf and the nearby environs. *See supra* Part III.

V. PETITIONERS' INFORMATION WILL ASSIST DECISIONMAKING

DOBOR is obligated to conduct an analysis to ensure that permitting decisions will not unreasonably burden Petitioners' traditional and customary rights under article XII, §7 of the Hawai'i constitution. Petitioners can provide information about the traditional and customary practices that underlie those rights, how they are affected, and how they may be feasibly protected. Petitioners are and include members of the public that regularly use Mala wharf and ramp and have had numerous engagements with DOBOR personnel in regard to ways of resolving user conflicts and impacts on natural resources and traditional and customary practices.

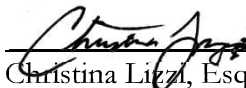
To the extent that issuance of permits and contested cases regarding issuance of said permits is a matter within the jurisdiction and authority of the Board of Land and Natural Resources solely, Petitioners alternatively seek a contested case before the Board for the same reasons mentioned herein.

VI. CONCLUSION

For these reasons, Petitioners respectfully request that that DOBOR, or alternatively, the Board of Land and Natural Resources, grant a contested case on the above-captioned permits.

DATED: Wailuku, Maui, Hawai'i

October 6, 2021



Christina Lizzi, Esq.
Law Office of Christina Lizzi, LLC
Attorney for Petitioners

DIVISION OF BOATING AND OCEAN RECREATION
DEPARTMENT OF LAND AND NATURAL RESOURCES

In re Applications of)	
	)	REQUEST FOR WAIVER OF CONTESTED
	)	CASE FILING FEE
HAWAIIAN RAFTING ADVENTURES)	
INC, under Permit Nos. 20-43171/MALA 04)	
and 20-43171/MALA 05; LAHAINA)	
HARBOR WATER TAXI under Permit No.)	
20-38191/MALA 06; and UNDERWATER)	
SAFARI, INC, under Permit No. 20-)	
38199/MALA 20; for Commercial Use Permits)	
to utilize Mala Wharf and Ramp, at Mala Wharf)	
Road, Lahaina, Hawai'i on the Island of Maui,)	
<u>TMK No. (2) 4-5-5:003</u>)	

REQUEST FOR WAIVER OF CONTESTED CASE FEE

NĀ PAPA'I WAWAE 'ULA'ULA, an unincorporated association, KA MALU O KAHĀLĀWAI, a domestic non-profit corporation, KEKAI KEAHI and KAI NISHIKI, individuals, by and through their undersigned counsel, request a waiver of the \$100 fee for their contested case request under HAR §13-1-30. Petitioners are community-based organizations, associations, and individuals who have no commercial properties to gain from their challenge to the above-referenced permits. For these reasons, Petitioners respectfully request the Board grant this waiver.

DATED: Wailuku, Maui, Hawai'i

October 6, 2021



CHRISTINA LIZZI
LAW OFFICE OF CHRISTINA LIZZI LLC
ATTORNEY FOR PETITIONERS

DIVISION OF BOATING AND OCEAN RECREATION
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In re Applications of)	
)	
	)	DECLARATION OF KEKAI KEAHI
HAWAIIAN RAFTING ADVENTURES)	
INC, under Permit Nos. 20-43171/MALA 04)	
and 20-43171/MALA 05; LAHAINA)	
HARBOR WATER TAXI under Permit No.)	
20-38191/MALA 06; and UNDERWATER)	
SAFARI, INC, under Permit No. 20-)	
38199/MALA 20; for Commercial Use Permits)	
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Road, Lahaina, Hawai'i on the Island of Maui,)	
<u>TMK No. (2) 4-5-5:003</u>)	

DECLARATION OF KEKAI KEAHI

I, KEKAI KEAHI, do declare under penalty of law that the following is true and correct.

1. I am a longtime resident of Lahaina, in the island and county of Maui, and over eighteen years of age.
2. I am a board member of Ka Malu O Kahālāwai
3. Ka Malu O Kahālāwai, a domestic nonprofit corporation, is organized to protect the natural and cultural history and resources of Kahoma and surrounding ahupua'a from mauka to makai.
4. Ka Malu o Kahālāwai members conduct traditional and customary practices of fishing, surfing, canoe paddling, and diving in nearshore areas and also pelagic fishing, utilizing Mala wharf and ramp.
5. I am also a member of Nā Papa'i o Wae'wae 'Ula'ula
6. I am a descendent of the aboriginal people who inhabited the Hawaiian Islands prior to 1778.
7. I am a Native Hawaiian traditional and customary practitioner.
8. My family has lived in West Maui for generations.
9. I am a lineal descendant of owners of a kuleana parcel in Kanahā Valley, where we were raised as small children.

10. Until I was in seventh or eighth grade, approximately 35 years ago, I would go with my father and others in my family to conduct traditional and customary fishing practices in the area of Mala wharf and ramp.
11. Our traditional and customary fishing practice involved an 'ōpelu māmā.
12. We trained a barracuda, called the 'ōpelu māmā, so that it would round up the 'ōpelu.
13. We would paddle out, hit the boat with a specific drum beat, and the 'ōpelu māmā would go to the canoe.
14. Boat captains, like my father, would name their 'ōpelu māmā. My father's 'ōpelu māmā was called Jacob. He was recognizable because he had a blind eye.
15. Once Jacob rounded up the 'ōpelu into a ball we could more easily catch the 'ōpelu.
16. Our traditional fishing practice of 'ōpelu māmā ceased when commercial activity increased at Mala Wharf and Ramp, which scared away the opelu schools.
17. The knowledge of how to train the 'ōpelu māmā will be lost without places where future generations are able to learn it.
18. There is a traditional fish ko'a off of Mala wharf, but the fish have largely been scared away from it by commercial activity and use of Mala wharf and ramp.
19. I and other officers and supporters of Ka Malu O Kahālāwai have had difficulty finding parking at Mala wharf, which prevents us from being able to go out fishing, or cuts our time short.
20. Customers and staff of commercial operations at Mala wharf take up the parking spaces that are supposed to be available to the general recreational public.
21. Commercial companies arrive at Mala wharf and ramp early and use the ramp repeatedly throughout the day.
22. Fishermen have to compete with the commercial operations for an opportunity to launch their boats and again to return to the ramp.
23. I have observed groups gathering at the ramp waiting to board commercial vessels, which makes it more difficult and dangerous for others trying to launch from the ramp.
24. No one appears to be enforcing any time limits on use of the ramp by commercial companies.
25. Excessive commercial activity negatively impacts the environment around Mala wharf, including through pollutants from the boats, litter, and use on non-reef safe sunscreens.

26. I, and others in my 'ohana and Ka Malu o Kahālāwai, have been unable to conduct our traditional and customary practices of fishing due to the lack of parking spaces, inability to launch our boats from Mala wharf, and the uncertainty and complications associated with timing a return to the ramp.
27. I, and others in Ka Malu o Kahālāwai have attempted to raise our concerns to the Division of Boating and Ocean Recreation by talking to Ed Underwood and Paul Sensano, and DOBOR staff were unable to resolve our concerns.
28. I, and others in Ka Malu o Kahālāwai have attempted to raise our concerns to commercial use permit holders, but they denied having any responsibility for ensuring access for the recreational public or Hawaiian traditional and customary practitioners.

DECLARANT FURTHER SAYTEH NAUGHT.

Dated: Lahaina, Maui, Hawai'i

October 1, 2021

A handwritten signature in black ink, appearing to read 'Kekai Keahi', is written over a horizontal line.

KEKAI KEAHI

Petitioner, Ka Malu O Kahālāwai

DIVISION OF BOATING AND OCEAN RECREATION
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In re Applications of)	
)	
HAWAIIAN RAFTING ADVENTURES	)	DECLARATION OF KAI NISHIKI
INC, under Permit Nos. 20-43171/MALA 04)	
and 20-43171/MALA 05; LAHAINA)	
HARBOR WATER TAXI under Permit No.)	
20-38191/MALA 06; and UNDERWATER)	
SAFARI, INC, under Permit No. 20-)	
38199/MALA 20; for Commercial Use Permits)	
to utilize Mala Wharf and Ramp, at Mala Wharf)	
Road, Lahaina, Hawai'i on the Island of Maui,)	
<u>TMK No. (2) 4-5-5:003</u>)	

DECLARATION OF KAI NISHIKI

I, KAI NISHIKI, do declare under penalty of law that the following is true and correct.

1. I was born and raised on the island and county of Maui and continue to be a resident of Maui.
2. In 2017, I was one of the awardees of the Sierra Club Maui Group's "Mālama Kahakai" award, which recognized our work in protecting Maui's costs and defending public access to beaches.
3. I live in Wahikuli, West Maui, less than five miles from the Mala Wharf and Boat ramp in Lahaina.
4. I am a coordinating member of Nā Papa'i o Waewae 'Ula'Ula (Nā Papa'i), an unincorporated association based in West Maui.
5. Nā Papa'i holds in-person community meetings with West Maui communities and administers a social media page on facebook.com for a group called "Access Denied!" which group has over 4,000 members.
6. Nā Papa'i and its members, including Native Hawaiians, hold interests in preserving and expanding public beach access for public recreational use, Hawaiian cultural practices, subsistence, aesthetic enjoyment, and ecological protections for West Maui.

7. My family and I have often been thwarted in attempts to use public beach access parking stalls located near to Mala wharf and ramp due to overcrowding.
8. I, and my family, frequently use Mala Wharf and surrounding shoreline areas for recreational purposes and to serve our aesthetic interests.
9. I, members of my family, and Nā Papa'i members frequently surf, paddle, fish, swim, spearfish, and snorkel in waters around Mala Wharf.
10. I hold a recreational and aesthetic interest in the maintenance of a healthy marine environment at Mala Wharf and its shoreline areas.
11. Members of Nā Papa'i include spearfishers, fishers, surfers, paddlers, swimmers, native Hawaiian traditional and customary practitioners, and others concerned about the environment created by commercial operations at Mala Wharf.
12. Mala Wharf and the nearshore areas are frequently crowded with various thrillcraft jetskis, wave runners, catamarans, and other commercial activities.
13. Holding a contested case hearing prior to issuance of commercial use permits to Noio Charters and Extended Horizons would further Nā Papa'i's mission and my interests in recreation and protecting the clean and healthful environment of West Maui and the waters in and around Mala Wharf specifically.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Lahaina, Maui

October 4, 2021


KAI NISHIKI
Petitioner-Declarant