

October 20, 2021

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

Re: Item J(5) – Contested Case Hearing Petition by Ka Malu O Kahālāwai, Nā Papa‘i Waewae ‘Ula‘Ula (“Nā Papa‘i”), Kekai Keahi, and Kai Nishiki regarding Renewal of Commercial Use Permits for Hawaiian Rafting Adventures, Inc., Lahaina Harbor Water Taxi, Inc., and Underwater Safari, Inc. for Mala Launch Ramp, Maui

Dear Chair Case and Members of the Board of Land and Natural Resources:

Thank you for considering these comments submitted on behalf of Ka Malu O Kahālāwai, Nā Papa‘i Waewae ‘Ula‘Ula (“Nā Papa‘i”), Kekai Keahi, and Kai Nishiki (collectively, “Petitioners”) with respect to the Board of Land and Natural Resources October 22, 2021 Meeting Agenda Item J(5): “Denial of Petitions for Contested Case Hearing filed on October 6, 2021 regarding Renewal of Commercial Use Permits for Hawaiian Rafting Adventures, Inc., Lahaina Harbor Water Taxi, Inc., and Underwater Safari, Inc. for Mala Launch Ramp, Maui.”

On October 6, 2021, Petitioners requested a contested case on any application to the Division of Boating and Ocean Recreation in the Department of Land and Natural Resources (“DOBOR”) for renewal or issuance of commercial use permits for Hawaiian Rafting Adventures, Inc., Lahaina Harbor Water Taxi, Inc., and Underwater Safari, Inc. (collectively, the “Companies”) for commercial use of Mala wharf and ramp, located in Lahaina, Maui (“Mala Wharf”). DOBOR previously granted both entities year-long commercial use permits that expire October 31, 2021. Specifically, Hawaiian Rafting Adventures holds permits 20-43171/ MALA #4 and 20-43172/ MALA #5, Lahaina Harbor Water Taxi holds permit 20-38191 / MALA #06, and Underwater Safari, Inc. hold permit 20-38199/MALA #20.

Renewal of the Companies’ commercial use permits impacts Petitioners’ ability to engage in traditional and customary practices protected under Article 12, Section 7 of the Hawai‘i State Constitution, as well as Petitioners’ right to a clean and healthful environment, as defined by Chapter 200, Hawaii Revised Statutes (“HRS”), and the administrative rules implementing the Board’s conservation duties through DOBOR. As outlined in the declarations attached to the Petition, among other things, Petitioners’ ability to engage in traditional fishing practices is impacted due to commercial activity in the water and its effect on fish, competition to enter the water via the ramp, and lack of access to the ramp due to overcrowding in the parking lots. The permits contemplated

for renewal each result in competition for use of the ramp, increases in the number of patrons utilizing parking at and around the wharf, and impacts on fish.

The standard commercial use permits issued to operators do not contain any conditions limiting the amount of time each operation can use the ramp each day. Exhibit A is a redacted example of a commercial use permit. Condition 17 therein reserves the Department's right to impose further conditions. Petitioners respectfully request that their petition be granted to ensure that Petitioners' interests are fully accounted for in the permitting process, and so that appropriate conditions may be imposed to protect their interests.

Further, DOBOR's submittal recommending denial of the Petition mischaracterizes the basis of Petitioners' contested case request. Petitioners do not contest the validity of Hawai'i Administrative Rule ("HAR") § 13-231-67(d) or the limits that it sets on the number of commercial use permits that may be issued at Mala Wharf. Nor do Petitioners seek to contest any other administrative rule related to the issuance of commercial use permits through a contested case request. Rather, Petitioners assert due process rights to a contested case hearing based on (1) article XII, § 7 of the Hawai'i Constitution rights to engage in traditional and customary practices that are impeded by the issuance of commercial use permits at Mala Wharf; and (2) Petitioner's property interest in a clean and healthful environment, as provided for under article XI, § 9 of the Hawai'i State Constitution and defined by Chapter 200, Hawai'i Revised Statutes ("HRS"), and the administrative rules implementing the Board's conservation duties through DOBOR. A contested case is also required to effectuate the Board and DOBOR's fiduciary duties over public trust resources.

DOBOR and the Board may impose conditions to address public welfare and the environment on permits. In *Young v. Coloma-Agaran*, the Ninth Circuit Court of Appeals considered whether an administrative rule¹ banning issuance of commercial use permits to all commercial vessels in Hanalei River, Hanalei Bay ocean waters and at Anini Beach launching ramp was

¹ HAR § 13-256-36 (2000) (subsequently repealed) provided as follows:

(1) No commercial vessel shall operate at or use the Hanalei River, Hanalei Bay ocean waters, or Anini Beach launching ramp for any commercial purposes without a commercial use permit.

(2) No commercial use permits shall be issued for commercial vessels to operate at or on the Hanalei River or Hanalei Bay ocean waters, except that up to two commercial use permits may be issued for kayaks to operate on the Hanalei River or Hanalei Bay ocean waters.

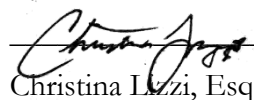
preempted by federal law regulating coastal licenses. *Young v. Colma-Agaran*, 340 F.3d 1053, 1055 (9th Cir. 2003). The court of appeals held that because the state ban “completely exclude[d]” coastal license holders “conducting their federally-licensed tour boat businesses,” the state ban was preempted by federal law. The court declined to consider whether the ban was unconstitutional under the Commerce Clause. *Id.*, 340 F.3d at 1058. The DOBOR submittal fails to acknowledge that the federal district court decision was affirmed by the Ninth Circuit Court of Appeals on other grounds than those put forth by the district court, and that the Ninth Circuit’s decision is binding.

Importantly, the Ninth Circuit appeals court reiterated, “that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power,” so long as those regulations are not in conflict with federal law. *Id.*, 340 F.3d at 1056 (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977)). Indeed, DOBOR has conceded that it intends to impose such measures upon commercial users through the establishment of a Mala Working Group to address some of the concerns raised by Petitioners, as well as by including conditions in future permits upon which administrative enforcement action may be based.

This “working group” and proposed conditions, however, neither satisfy nor diminish Petitioners’ right to due process with respect to renewing the Companies’ permits. Although Petitioners welcome this initiative, DOBOR has not contacted Petitioners to include their input in the working group. Nor are Petitioners aware of any other community groups that have been included in discussions to date. Such a working group cannot and does not afford Petitioners’ the opportunity to protect their property interests’ that are impacted by the renewal the Companies’ permits. A contested case is required to afford Petitioners’ due process, and to ensure that appropriate conditions on these specific permits may be included to protect Petitioners’ interests. Additionally, Petitioners’ interests align with the many other recreational users of Mala Wharf, and as such, a contested case would benefit the public at large.

Dated: Wailuku, Hawaii

October 20, 2021



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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF BOATING AND OCEAN RECREATION
COMMERCIAL OPERATIONS PERMIT
MALA LAUNCH RAMP

Type of Commercial Operations:

- ☐ Commercial Use Permit
☒ Commercial Ramp Permit - RENEWAL
☐ Vessel Moored Elsewhere (VME)

Date:

Permit No.:

Account No.:

This permit authorizes (hereinafter referred to as the Permittee) to conduct the describe commercial activities (on signature page) on the ocean waters of the State of Hawaii located on the island of Maui, the Ocean recreation management area or non-designated management area, to commence on and expires on unless terminated for cause.

Copies of the following exhibits are submitted for review and the record (if applicable):

- ☒ Vessel Documentation and/or Vessel Registration -
☒ Vessel Inspection or Approved Marine Surveyor -
☒ General Excise Tax License
☒ DCCA Certificate of Good Standing -
☐ Letter of Permission from Land Owner for Access to the State Ocean Waters
☒ Certificate of commercial insurance policy naming the State of Hawaii as an additional insured, containing sufficient coverage limits and meeting all other requirements as outlined in Hawaii Administrative Rules §13-231-65 -
☒ Certificate of Compliance from the Hawaii Department of Taxation -
☐ Partnership, Joint Venture, Corporate Exhibits
☐ PUC for vehicle(s), if applicable
☒ Certificate of Inspection for any vessels used in your commercial operation, if applicable.

1. The Permittee agrees to abide by all applicable Federal, State, and County laws and all boating and shore water rules promulgated by the Department of Land and Natural Resources (referred to as the Department). In addition to any fines or penalties a court of law may impose, any violation(s) of the provisions of the aforementioned laws or rules may cause this permit to be terminated by the Department of Land and Natural Resources Division of Boating and Ocean Recreation (the "Department") by written order of its Representative, and the vessel or operation shall immediately cease commercial activity. Issuance of a commercial use permit from DOBOR does not grant you transit rights to access the shoreline or conduct commercial activities on shore.
2. The Permittee agrees to operate the vessel or equipment described in this permit in accordance with all applicable rules and regulations regarding passenger-carrying capacity and commercial vessel activities.
3. When applicable, the Permittee agrees to present proof, upon request, of Coast Guard certification for the vessel(s) registered with the Department.
4. The fee for this commercial use permit will be as follows:
 - a. Commercial permittees operating from state land: The cost for a commercial use permit shall be \$300.00 per month or 3% of your gross receipts, whichever is greater.
 - b. Commercial permittees operating from a private or county facility or land and said operation does not involve the use of state fast land or land within a shoreline area: \$300.00 per month due and payable by the first day of each month.

- c. Commercial permittees possessing a harbor commercial use permit and a commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate, who are paying their mooring fee or 3 per cent of gross receipts per month (whichever is greater) under the harbor commercial use permit, shall not be required to pay an additional 3 per cent of gross receipts per month under the commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate, provided that the payment made to the department is based on the total of gross receipts acquired under the harbor commercial use permit and the commercial use permit for state ocean waters or a navigable stream or a catamaran registration certificate.

The foregoing fees are subject to change based upon amendments made to Hawaii Revised Statutes and/or Hawaii Administrative Rules.

5. The fees stated above are due and payable to DOBOR in advance of the first day of the month. Not later than 30 days following the end of the month, the Permittee shall submit to the Division a report of gross receipts for the month plus payment of any additional amount required by the percentage of the gross receipts specified in paragraph 4. Failure to submit the report of gross receipts as required shall be cause for termination of the commercial use permit.
6. During scheduled events pursuant to a marine event permit or other official permission and authorized by the State or U.S. Coast Guard, vessel(s) or operations issued commercial use permits may be required to adjust their schedules or temporarily cease activity as directed by the Department.
7. The Permittee agrees to notify the Department in writing of any changes concerning ownership, address, vessel inventory or operator(s) of a vessel(s) within 7 days of the date of change. Failure to promptly notify the Department of any changes may cause this permit to be terminated by the Department.
8. The Permittee shall at all time use due care for public safety and shall defend, hold harmless and indemnify the State of Hawaii, its officers, agents and employees from and against all claims or demands, including claims for property damage, personal injury or death arising out of or incident to the operation of said vessel or operation.
9. The permit charges are for the privilege of operating a commercial vessel or operation in state navigable waters in the manner stated above. Any other use of harbor/ramp facilities or services must be requested and approved separately.
10. The duration of this commercial operating area use permit shall not exceed the period of 1 year from the date of commencement.
11. The Department may immediately revoke a commercial use permit without a hearing for activity that endangers or may endanger the health or safety of passengers or the public, and may suspend or revoke a commercial use permit for violation of any rules of the Department, if the activity or offense is not corrected following seventy-two (72) hours notice by the Department of the violation. The permit holder shall have ten (10) days from receipt of the notice of suspension or revocation to request in writing an administrative hearing. The administrative hearing is solely for the purpose of allowing the permit holder to contest the basis for suspension or revocation of the permit.
12. This commercial use permit shall be kept in the immediate possession of the Permittee or its agent(s), or at a place of safekeeping in the immediate vicinity of the permitted activity at all times when operating under this commercial use permit and Permittee or its agent(s) shall display the same upon the demand of a Federal, State, or County Enforcement Officer, or representative of the Department.
13. Gross Receipts Defined: Gross receipts shall include all receipts, whether by coin or currency, on account, by check or credit card, derived or received by the Permittee as a result of its operation herein granted and shall include the sales prices received or billed by the Permittee from the sale or rental of its equipment/or services of: See signature page. The Permittee shall not be credited with, nor allowed to have any reduction in the amount of the gross receipts, as hereinabove defined, which results from any arrangements for illegal rebates or kickbacks or hidden credits given or allowed to customers.

14. Business Practices & Records: In connection with the obligations of the Permittee, Permittee hereby agrees to:

a. Prepare and keep for a period of not less than three (3) years following the end of each permit year adequate records which shall show daily receipts from all sales and other transactions by the Permittee. The Permittee shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit. The Permittee shall issue to each customer a receipt or sales slip for each transaction and must be recorded on serially-numbered receipts or sales slips. The Permittee further agrees to keep in storage for at least one (1) year following the termination, suspension, or revocation of the permit, all pertinent original sales records, serially-numbered sales slips and such other sales records, as would normally be examined by an independent accountant pursuant to accepted auditing standards in performing an audit of the Permittee's sales and gross receipts.

b. Submit to the Department on or before the 30th day of each and every month following each permit month (including the 30th day of the month following the end of the term) at the place fixed for payment of permit fees, a written statement using forms prescribed by the Chairperson of the Department of Land and Natural Resources to be certified as correct by the Permittee or by a person duly authorized by the Permittee to so certify showing in accurate detail, the amount of gross receipts for the preceding month and shall further submit to the Department on or before the 60th day following the end of each permit year at the place fixed for payment of fees, a written statement certified as correct by the Permittee or by a person duly authorized by the Permittee to so certify showing in accurate detail the amount of gross receipts during the preceding year duly verified by an independent Certified Public Accountant. The statements referred to herein shall be in such a form and style and contain such detail and breakdowns as the Department may require. Without any prejudice to any remedies herein provided for such default, if the Permittee shall fail to promptly furnish any such monthly report or Certified Public Accountants Annual Verification report, the Department may have such report prepared on the Permittee's behalf by an accountant to be selected by the Department, at the expense of the Permittee. The Permittee shall furnish to such accountant all records requested for the purpose of preparing such reports, and the Permittee shall pay to the Department all expenses incurred by the Permittee in securing such reports. Furthermore, the Department may make assessments upon the Permittee by recourse to such procedures selected by the Department which would produce reasonable gross receipts expectation upon which percentage charges may be computed.

In the event that records have not been prepared and kept in accordance with the provisions set forth herein, the Department shall, in addition to all other payments required herein, be entitled to demand and receive an additional payment of ten percent (10%) of the applicable fee if the Permittee is paying fees based on percentage for the period or periods involved. Permittee shall grant unto the Department at all reasonable times access to all books, accounts, records and reports, including gross income tax reports, showing daily sales and at any reasonable times on twenty-four (24) hours notice will permit a complete audit to be made by the Department's Account or by a Certified Public Accountant of the Permittee's entire business affairs and records relating to the business authorized by this permit for the term of this permit.

The Permittee will cooperate fully in the making of any inspection, examination or audit. Should such audit by the Department's Accountant or by a Certified Public Accountant disclose that rental has been underpaid by two percent (2%) or more for any period under examination, the Department shall, in addition to the remedies provided in the above, be entitled to reimbursement of the reasonable cost of any such audit in addition to the deficiency. If such audit by the Department's Accountant or by a Certified Public Accountant shall disclose that rent has been underpaid by five percent (5%) or more for the period under examination, the Department shall have the right, upon ten (10) days written notice to terminate this permit.

15. Time of Payment: The minimum monthly guaranteed fee required herein, shall be paid monthly, in advance, without notice, on the first day of each and every month of each and every year of the term hereof.
16. This permit does not grant any property rights or exclusive privileges.
17. The Department reserves the right to impose further restrictions.

18. Vessel Information:

Vessel Name: [REDACTED]

Vessel Registration: [REDACTED]

Vessel Length: [REDACTED]

19. Restrictions:

Sites:

• [REDACTED]

Activity:

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

I AGREE TO THE TERMS, CONDITIONS AND CHARGES:

Address: [REDACTED]

Email Address: [REDACTED]

Business Phone: [REDACTED]

Cellular Phone: [REDACTED]

Signed by (Authorized Representative) [REDACTED]

Print Name [REDACTED]

Date Signed: [REDACTED]

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

BY: SHARON F. STONE-HARBOR AGENT II

Printed Name

BY: Sharon F. Stone
Signature

Date: [REDACTED]

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
ROBERT K. MASUDA
FIRST DEPUTY DIRECTOR-LAND
M. KALEO MANUEL
DEPUTY DIRECTOR - WATER
EDWARD R. UNDERWOOD
ADMINISTRATOR
DIVISION OF BOATING AND OCEAN RECREATION



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

675 Wharf Street
Lahaina, Hawaii 96791

Permit # [REDACTED]

Mala Commercial Permit #: [REDACTED]

Account # [REDACTED]

Rules and Regulations

RENEWAL

I agree to the following terms, conditions and charges:

1. I agree to abide by all rules promulgated by the Department of Land and Natural Resources and conditions of this permit. Rules are available online at <http://hawaii.gov/dlnr/dbor/borrules.htm>.
2. The vessel will be moored at the location designated by the official representative of the Department of Land and Natural Resources and tied up in a manner approved by the representative.
3. The PERMITTEE will pay the STATE fees and charges in advance or before the first day of each month for the use of the berth and any additional facilities or services assigned or provided to the PERMITTEE by the STATE, in such sums as are prescribed by the HAWAII ADMINISTRATIVE RULES, SMALL BOAT HARBORS, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, in effect on the date of issuance of this permit, and in the future as prescribed by any amendments thereto. The fees in effect are as follows:

<input type="checkbox"/> Mooring	\$
<input type="checkbox"/> Electricity	\$
<input type="checkbox"/> Gear Locker	\$
<input type="checkbox"/> Security Deposit	\$
<input checked="" type="checkbox"/> Other Ramp	\$ 300.00
<input type="checkbox"/> Other	\$
Monthly Payment	\$ 300.00

4. A mooring permit may be cancelled by a boat owner upon thirty (30) days written notification as prescribed in Section 13-231-9, and charges will be made in accordance with Section 13-234-2(d) of the Small Boat Harbor Rules. The Security Deposit will be applied to any outstanding balance. The remaining will be returned via mail within a reasonable time.
5. This mooring privilege may be terminated by the Department of Land and Natural Resources by written order of the said representative and the boat will be moved from the mooring at any time on order of the said representative should necessity arise. Failure to do so may result in the impoundment of the vessel.
6. This mooring permit and related use permits will AUTOMATICALLY EXPIRE if the vessel is absent from its assigned berth, mooring, and/or assigned offshore anchorage area for more than fourteen (14) days unless the holder of the permit applies for and receives permission from the Department to retain the use of the assigned berth and related permits upon the vessel's return (Sec. 13-231-11 of the Small Boat Harbors Rules)

7. The Department of Land and Natural Resources, its members, officers, agents and employees shall not be liable to me or any other person for damages to the boat or any other property or for injury to any person arising out of or incident to the mooring of said boat. And I hereby covenant and agree that I will indemnify and save harmless said Department, its members, officers, agents, and employees from any and all manner of actions, liability and claims arising out of or incident to said mooring; including acts incurred while attempting to save the vessel from sinking or preventing a pollution incident from occurring.
8. This mooring permit shall not exceed (1) year from [REDACTED] (date) and the mooring privilege under this permit terminates on [REDACTED] (date). A new mooring permit may be obtained within ninety (90) days prior to the termination date listed above only if all fees and charges due, per Hawaii Administrative Rules, have been paid and upon completion of a satisfactory vessel inspection. Failure to obtain a new mooring permit prior to the termination date listed above shall result in the vessel owner being charged the rate for vessels moored without a permit, and may result in the vessel being required to vacate the harbor, offshore mooring area, and/or ramp facility.
9. A new mooring permit may be obtained within ninety (90) days prior to the termination dated listed above only if all fees and charges due, per Hawaii Administrative Rules, have been paid and upon completion of a satisfactory vessel inspection and buoy run. Failure to obtain a new mooring permit prior to the termination date listed on the permit, shall result in the owner being charged the rate for vessels moored without a permit and a one-time payment of \$250.00 shall be paid as long as it is within 30 days from the date of the expiration. Failure to comply with the 30 day extension shall result in the vessels being required to vacate the harbor, offshore mooring area, and/or ramp facility.
10. The department retains the right to not issue a new permit after the termination date of this permit.
11. I shall obtain and continue to secure a Certificate of Insurance policy for General Liability insurance in the amount of \$500,000 and name the State of Hawaii as an additional insured, for as long as my permits is valid. Commercial Permittees shall refer to HAR-13-231-65 on minimum insurance requirements.

Vessel owners will be required to show proof of insurance when applying or reapplying for mooring permits. Acceptable coverage would include a minimum of \$500,000 in boat liability insurance (protection and indemnity) that names the State of Hawaii, Division of Boating and Ocean Recreation as additional insured.

[REDACTED]
Permittee Signature

[REDACTED]
Date

[REDACTED]
Printed Name of Permittee - Steven Lawless, President

Address [REDACTED]

City, State, Zip [REDACTED]

[REDACTED]
Home Phone [REDACTED]

and/or [REDACTED]

Work Phone [REDACTED]

Approved by: [REDACTED]

Sharon F. Stone
Department of Land and Natural Resources
Division of Boating and Ocean Recreation
Sharon F. Stone - Harbor Agent II