

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

January 14, 2022

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

SUBJECT: Denial of Petition for Contested Case Hearing filed on November 22, 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 Noio Charters, Inc., Extended Horizons, Inc., Adventure Rafting, Inc., and Ocean Riders, 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 November 22, 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. Additionally, DOBOR recommends that the Board delegate the authority to grant or deny any future CCH petitions of this type to the Chairperson.

This submittal has been revised and re-submitted as of January 10, 2022 to make clarifications regarding the CUPs contemplated in Petitioners' CCH petition.

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 four commercial operators using the Mala boat launch ramp: Noio Charters, Inc., Extended Horizons, Inc., Adventure Rafting, Inc., and Ocean Riders, Inc. (the petition is attached as **EXHIBIT A**). The CUPs for these four operators were set to expire on December 31, 2021. The CUPs for Adventure Rafting, Inc. and Ocean Riders, Inc. were renewed until March 31, 2022 to allow the Board to review and decide on the CCH petition. The CUPs for Noio Charters, Inc. and Extended Horizons, Inc. were renewed until December 31, 2022 on November 19, 2021, before the CCH petition was filed, and therefore, the CCH petition as it relates to these two CUPs should be denied as untimely.

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.

Additionally, staff notes that this is the third CCH petition of this type from Petitioners. Despite the previous two CCH petitions being denied by the Board pursuant to HAR § 13-1-29.1, Petitioners continue to submit the same CCH petition and apply the petition to the commercial operator(s) whose CUPs are due to expire next. Therefore, DOBOR recommends that the Board delegate to the Chairperson the authority to grant or deny CCH petitions similar to the ones submitted by Petitioners in the interest of efficiency.

RECOMMENDATIONS:

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

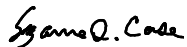
3. That the Board delegate authority to the Chairperson to grant or deny any future contested case hearing petitions regarding DOBOR commercial use permit renewal for Mala boat launch ramp.

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. November 22, 2021 Contested Case Hearing Petition by Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki

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KA MALU O KAHĀLĀWAI, NĀ PAPA'I WAWAE 'ULA'ULA,
KEKAI KEAHI, and KAI NISHIKI

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
NOIO CHARTERS, INC., under Permit No.) KEAHI, AND KAI NISHIKI'S PETITION
20-104046/MALA 13; EXTENDED) FOR CONTESTED CASE HEARING ON
HORIZONS, INC., under Permit No. 20-) COMMERCIAL USE PERMITS
92982/MALA 18; ADVENTURE RAFTING,) APPLICATIONS FOR USE OF MALA
INC., under Permit No. 20-56638/MALA 01;) WHARF AND RAMP; DECLARATION OF
and OCEAN RIDERS, INC., under Permit No.) KEKAI KEAHI; DECLARATION OF KAI
20-56570/MALA 02 for Commercial Use) NISHIKI; REQUEST FOR WAIVER OF
Permits to utilize Mala Wharf and Ramp, at) CONTESTED CASE FILING FEE
Mala Wharf 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, or, in the
alternative, the Board 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") pursuant to Hawai'i Administrative Rules ("HAR") §13-1-31 from Applicants NOIO
CHARTERS, INC., being the same entity and use currently operating under Permit Nos. 20-

104046/MALA 13; EXTENDED HORIZONS, INC., being the same entity and use currently operating under Permit No. 20-92982/MALA 18; ADVENTURE RAFTING, INC., being the same entity and use currently operating under Permit No. 20-56638/MALA 01; and OCEAN RIDERS, INC., being the same entity and use currently operating under Permit No. 20-56570/MALA 02 (collectively, the “Mala Wharf CUPs”).

Upon information and belief, the Mala Wharf CUPs will expire on December 31, 2021 or thereafter. New permits should not be issued unless and until Petitioners are afforded an opportunity to protect their property interests in the reasonable exercise of native Hawaiian traditional and customary practices, guaranteed by article XII, section 7 of the Hawai‘i State Constitution, and to a clean and healthful environment as defined by Chapter 200, HRS and regulations pertaining to commercial use of state boating facilities and waters, through contested case hearings as defined by Hawai‘i Revised Statutes (HRS) § 91-1 and to provide information to assist decisionmakers in protecting those interests as well as in performing the necessary *Ka Pa‘ukai O Ka ‘Aina* analysis.

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, including but not limited to, of fishing, surfing, canoe paddling, gathering, and diving in nearshore areas and also pelagic fishing utilizing Mala Wharf.

Petitioner Nā Papa‘i Wāewae ‘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, Kai Keahi, are Kānaka Maoli¹ traditional and customary practitioners who utilize Mala Wharf to launch boats to conduct subsistence and customary fishing practices and to teach younger

¹ Meaning, individuals who are descended from those who inhabited the Hawaiian archipelago in 1778, and whose reasonable exercise of traditional and customary practices is protected under Article XII, § 7 of the Hawai‘i State Constitution.

generations to do the same. HRS § 7-1, HRS § 1-1. These practices are protected by article XII, section 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 in addition to 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, including the activities of Noio Charters, Extended Horizons, Adventure Rafting, and Ocean Riders (the "Companies"). 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, including 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, including the Companies. 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). These rights are recognized as property interests. *Flores v. Bd. of Land & Nat. Res.*, 424 P.3d 469, 481 (2018) ("Akin to the appellants in *Manna Kea Anaina Hou*, here, Flores seeks to protect his interest in engaging in traditional Native Hawaiian cultural practices on Mauna Kea. Consequently, pursuant to article XII, section 7 of the Hawai'i Constitution, as interpreted by this court in *Manna Kea Anaina Hou*, we conclude that Flores has shown that he seeks to protect a constitutionally cognizable property interest in this case.")

Petitioners' officers and supporters are also persons with property interests in their right to a clean and healthy environment, as defined by Chapter 200, HRS and regulations pertaining to commercial use of state boating facilities and waters, which includes regulation of the environs used by commercial use permittees launching from Mala wharf and ramp. Hawai'i const. art. XI, §9. This right is "not a freestanding interest in general aesthetic and environmental values' or a 'unilateral expectation,' but a 'right guaranteed by the Constitution and statutes of this state.'" *Protect & Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n.* SCWC-15-0000478 at *20 (June 16, 2021) (quoting *MECO*, 141 Hawai'i at 264-65, 408 P.3d at 16-17). 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 the boat ramp, which is necessary to enter the ocean safely. Customers from the Companies crowd the ramp while waiting to sign waivers or receive information prior to boarding, creating unsafe conditions for others trying to use the ramp. There are no limits to how often the Companies may use the ramp each day, or for how long. Consequently, the Companies and other users monopolize the ramp for commercial purposes, and restrict access of Petitioners to utilize the ramp, as well as the general public.

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 the Companies. “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). Granting the Companies' applications for commercial use permits pursuant to HAR § 13-231-61 at Mala Wharf adversely affect 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).

To be clear, Petitioners do not contest the number of permitted commercial uses at Mala Wharf set forth in HAR § 13-231-67(d), or other regulations underlying commercial uses. The issue is how individual permittees conduct commercial operations at Mala Wharf and how such conduct impacts Petitioners' substantive interests. DOBOR has the power and duty to place conditions on the Companies' permits to ensure that the Companies' permitted use of Mala Wharf does not curtail reasonable exercise of native Hawaiian traditional and customary practices, and to protect

Petitioners' property interest in a clean and healthful environment.

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 islands 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, but not limited to, 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 Nishiki ("Nishiki Decl.") ¶¶ 6-12. As stated, due to the conduct of individual commercial use permittees, including activities of the Companies, Petitioners' ability to conduct these traditional and customary practices has been diminished at Mala Wharf. Issuance of commercial use permits to the Companies, without any protections afforded to Petitioners, will result in the continued violation 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 mā mā. 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.

At other times, Petitioners' members are unable to access the ramp at Mala wharf to engage in their traditional and customary practices because the Companies' and other commercial users monopolize the ramp. Permits could contain time restrictions on commercial use, but do not. Companies are allowed to set their own schedule of use for the ramp, and to utilize the ramp for numerous commercial trips throughout the day. Petitioners' members are also thwarted in their ability to conduct traditional and customary practices at Mala wharf entirely at times, because Companies' dominate the limited trailer parking, and customers and employees of the Companies and other commercial users take up limited public parking. Customers congregating on the ramp also creates unsafe conditions as others try to utilize the ramp, as does those who are in the water and drift in any out of the ramp area.

ii. Article XI, Section 9 of the Hawai'i State Constitution

Petitioners are also entitled to procedural due process based upon their substantive right to a clean and healthful environment. See *In re Maui 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 Board's authority to issue commercial use permits is derived from HRS § 200-2(a), which grants the Board “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). The duty specific to commercial use permits is further delegated to DOBOR. HRS § 200-4 empowers the Board to adopt rules to regulate vessels entrance into waters at State-owned launching ramps, “regulate the embarking and disembarking of passengers” at launching ramps; to promote safety at launching ramps, “to regulate and control recreational and commercial use” of launching ramps. HRS § 200-4. Further, to “prevent discharge of throwing into . . . launching ramps. . . ocean waters, and navigable streams of rubbish, refuse, garbage, or other substances likely to affect the quality of water of that contribute to making [those places] unsightly, unhealthful, or unclean” the Board is empowered to adopt “requirements for permits and fees” for the launching of commercial vessels from State-owned ramps, and requirements governing those activities. HRS § 200-4(a)(6)(a)(i), -(ii). HRS § 200-3 also imposes a duty upon the Board to assist “in abating air, water, and noise pollution.” HRS § 200-3(8).

HAR § 13-231-5(a) requires that to qualify for reissuance of a commercial use permit, commercial use permittees must “fully” comply with “the rules governing small boat harbors and navigable waters managed by the department of land and natural resources. . . .” HAR § 13-231-5(a). These rules include HAR § 13-252-6 “Littering or polluting water – prohibited,” which provides that:

No person shall place, throw, deposit, or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of a small boat harbor any litter, sewage, or other gaseous, liquid, or solid materials which render the water unsightly,

noxious, or otherwise unwholesome so as to be detrimental to the public health and welfare or to the enjoyment of the water for recreational purposes.

HAR § 13-252-6. Commercial use permittees must also comply with HAR §§ 13-232-1 through -19 pertaining to sanitation. The commercial use regulations thus are in place to, in part, regulate the impact of commercial uses on environmental quality. Petitioners' therefore 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 boating facilities and state waters.

Issuance of permits to the Companies contributes to ongoing degradation of environmental quality and the safety of the ramp, 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. Kahoma Ahupua'a Ass'n*, SCWC-15-0000478, at *23 (citation omitted).

As stated, Petitioners' have constitutionally protected property 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 the Companies.

The risk of an erroneous deprivation of these rights is high. Petitioners' have no other means to comment on or be consulted regarding issuance of specific permits, which are administratively approved.² Petitioners' ability to conduct traditional and customary practices at Mala

² Petitioners acknowledge that at the October 22, 2021 Board of Land and Natural Resources hearing, the Board instructed the Administrator of the Division of Boating and Ocean Recreation to meet with the community to address the ongoing problems regarding community access at Mala Wharf. Petitioners, however, continue to contest that such a meeting does not satisfy due process, as such a meeting is policy oriented, does not related to the issuance of these specific permits, and does not provide an opportunity for Petitioners to develop a record upon which a court could review whether Petitioners' property interests were sufficiently protected. Further, there are no procedural

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 §13-231-50. Mala wharf CUPs have not brought corresponding or reasonable benefits and returns to the public, but rather exclude public

safeguards in place in a community meeting to ensure that Petitioners are heard, have the opportunity present evidence, and to cross-examine opposing witnesses. As such, the proposed meetings, although a welcome step forward, do not satisfy due process.

use of Mala Wharf.

HAR § 13-231-61 conditions permit reissuance on (1) a threshold of gross receipts received from the companies, (2) that all fees and charges owed to the State have been paid, (3) that the permittee has no violations outstanding, (3) that the permit was not previously terminated for cause, and (4) that a company be in operation for at least twelve months if it is seeking reissuance of a permit where there has been a transfer of interest in the corporation. HAR § 13-221-61. These conditions thus only ensure financial *returns* are provided to the public. They do not ensure “corresponding and reasonable benefits” to the public. Mere compliance with the law – i.e., not having any outstanding violations or having had a permit previously terminated for cause – cannot reasonably be construed as providing a “benefit” to the public. Meeting the reissuance conditions of HAR § 13-231-61 alone therefore does not ensure compliance with HAR § 13-231-50.

In addition, when the negative impacts to the general public’s ability to use Mala Wharf and the diminishment of native Hawaian rights are weighed with the benefits to those who patronize the companies, there issuance of the CUPs does not provide “corresponding or reasonable benefits” to the public.

Petitioners also disagree with the Mala wharf CUPs because the conditions imposed do not feasibly protect Kānaka maoli’s reasonable exercise of traditional and customary practices that are negatively affected by the Companies’ operations at Mala wharf.

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/reissuance of permits to the Companies. Petitioners also request a contested case to assist DOBOR in fulfilling its duties under article XII, section 7 of the Hawai’i State Constitution and the mandate of *Ka Pu’akai O Ka Aina v. Land Use Commission*, 94 HAWAII 31, 7 P.3d 1068 (2000), which sets forth the findings of fact and conclusions of law that an agency must provide to effectuate its constitutional obligation.

Due process requires DOBOR to observe the following procedures: (1) refrain from granting Mala wharf permit reissuance applications; (2) hold a contested case hearing on the impact of these permitted 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

lessen impact to natural and cultural resources, requiring personnel and customers use provided reef-safe sunscreens, limiting the number of launches or patrons per day, or permitting Companies to launch from Mala Wharf but requiring them to pick up customers from Lahaina Harbor.

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 to assist DOBOR in complying with *Ka Pa'akai O Ka 'Aina*. 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. DOBOR is also a fiduciary of public trust waters, and obligated to ensure that the issuance of the permits does not unduly harm such resources

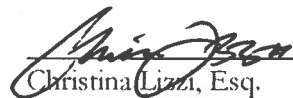
To the extent that issuance of permits and contested cases regarding issuance of said permits is a matter within the jurisdiction and authority of the Board of Land and Natural Resources solely, Petitioners alternatively seek a contested case before the Board for the same reasons mentioned herein.

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

November 22, 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
STATE OF HAWAII

In re Applications of)
)
) **DECLARATION OF KEKAI KEAHI**
NOIO CHARTERS, INC., under Permit No.)
20-104046/MALA 13; EXTENDED)
HORIZONS, INC., under Permit No. 20-)
92982/MALA 18; ADVENTURE RAFTING,)
INC., under Permit No. 20-56638/MALA 01;)
and OCEAN RIDERS, INC., under Permit No.)
20-56570/MALA 02 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)

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, including but not limited to, 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 Waewae '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. My grandmother's home is located about 300 yards from Mala wharf.
10. I learned to fish and dive at Mala wharf.

11. I am a lineal descendant of owners of a kuleana parcel in Kanahā Valley, where we were raised as small children.
12. 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.
13. Our traditional and customary fishing practice involved an 'ōpelu māmā.
14. We trained a barracuda, called the 'ōpelu māmā, so that it would round up the 'ōpelu.
15. We would paddle out, hit the boat with a specific drum beat, and the 'ōpelu māmā would go to the canoe.
16. 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.
17. Once Jacob rounded up the 'ōpelu into a ball we could more easily catch the 'ōpelu.
18. Our traditional fishing practice of 'ōpelu māmā ceased when commercial activity increased at Mala Wharf and Ramp, which scared away the opelu schools.
19. The knowledge of how to train the 'ōpelu māmā will be lost without places where future generations are able to learn it.
20. 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.
21. I and other officers and supporters of Ka Malu O Kahālāwai have had difficulty finding parking at Mala wharf due to commercial permittees use of limited boat trailer parking, which prevents us from being able to launch our boats, or cuts our time short.
22. Customers and staff of commercial use permittees at Mala wharf take up the parking spaces that are supposed to be available to the general recreational public, which reduces access to ramp for us to conduct our practices.
23. Commercial companies arrive at Mala wharf and ramp early and use the ramp repeatedly throughout the day.
24. Fishermen, including officers of Ka Malu, must compete with the commercial use permittees for an opportunity to launch their boats and again to return to the ramp.
25. The monopolization of the ramp by commercial use permittees forces us to cut our practices short, or to not engage in them at all.

26. I have observed groups gathering at the ramp waiting to board commercial use permittees' vessels, which makes it more difficult and dangerous for others trying to launch from the ramp.
27. Excessive commercial activity negatively impacts the environment around Mala wharf, including through pollutants from the boats, litter, and use on non-reef safe sunscreens.
28. 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 due to commercial use permittees.
29. 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.
30. 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

November 12, 2021

Kekai Keahi

KEKAI KEAHI

Petitioner, Ka Malu O Kahālāwai

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In re Applications of)
) PETITIONERS NĀ PAPA'I WAWAE
) 'ULA'ULA, KA MALU O KAHĀLĀWAI,
) NOIO CHARTERS, INC., under Permit No.) KEKAI KEAHI, AND KAI NISHIKI
) 20-104046/MALA 13; EXTENDED) PETITION FOR CONTESTED CASE
) HORIZONS, INC., under Permit No. 20-)
) 92982/MALA 18; ADVENTURE RAFTING,) DECLARATION OF KAI NISHIKI
) INC., under Permit No. 20-56638/MALA 01;)
) and OCEAN RIDERS, INC., under Permit No.)
) 20-56570/MALA 02 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)

DECLARATION OF KAI NISHIKI

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

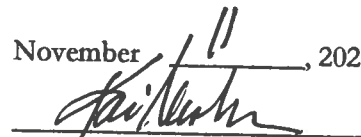
1. I was born and raised on the island and county of Maui and continue to be a resident of Maui.
2. In 2017, I was one of the awardees of the Sierra Club Maui Group's "Mālama Kahakai" award, which recognized our work in protecting Maui's costs and defending public access to beaches.
3. I live in Wahikuli, 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. Members have been thwarted in their ability to engage in traditional and customary practices due to the monopolization of the ramp by commercial use permittees.
13. From the commercial use permits I have seen, there is no standard condition limiting the amount of time each permittee may use the ramp or the number of trips commercial users may make from the ramp per day.
14. Members of Nā Papa'i have been thwarted in their ability to engage in traditional and customary practices due to commercial use permittees' employees and customers taking up the limited parking available in and around Mala wharf.
15. Commercial use permittees create dangerous conditions on the ramp, as their customers crowd the ramp to sign waivers or to receive instructions.
16. Mala Wharf and the nearshore areas are frequently crowded with various thrillcraft jetskis, wave runners, catamarans, and other commercial activities.
17. 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

November 11, 2021


KAI NISHIKI
Petitioner-Declarant

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

In re Applications of)
) REQUEST FOR WAIVER OF CONTESTED
) CASE FILING FEE
NOIO CHARTERS, INC., under Permit No.)
20-104046/MALA 13; EXTENDED)
HORIZONS, INC., under Permit No. 20-)
92982/MALA 18; ADVENTURE RAFTING,)
INC., under Permit No. 20-56638/MALA 01;)
and OCEAN RIDERS, INC., under Permit No.)
20-56570/MALA 02 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)

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

November 22, 2021


CHRISTINA LIZZI
LAW OFFICE OF CHRISTINA LIZZI LLC
ATTORNEY FOR PETITIONERS