From: Bail, Lisa A.

To: <u>DLNR.BLNR.Testimony</u>

Cc: Statts, Meghan L; Underwood, Ed R; Goldman, Melissa D; Larsen-Dias, Cynthia R.; Kim, Antony J.; Marie-Iha,

<u>Deirdre</u>

Subject: [EXTERNAL] Testimony re Agenda Item J-1 - BLNR Meeting 1/13/22

Date: Thursday, January 13, 2022 8:34:53 AM

Attachments: <u>image002.png</u>

Testimony from Lisa Bail for Agenda Item J-1.pdf

Attached is my written testimony for tomorrow's meeting regarding agenda item J-1. At the meeting, I will be presenting verbal testimony on behalf of my clients Noio Charters Inc., Extended Horizons Inc., Adventure Rafting, Inc. and Ocean Riders, Inc.

If agenda item J-1 is not called before mid-afternoon, there may be a brief period of time when my colleague, Deirdre Marie-Iha will instead present testimony for our clients. In the event this is necessary, I will provide her the Zoom link for our testimony. My further contact information is below.

Lisa A. Bail, Esq.



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January 13, 2022

VIA E-MAIL (blnr.testimony@hawaii.gov)

Chairperson Case and Members Board of Land and Natural Resources State of Hawaii 1151 Punchbowl Street Honolulu, HI 96813

Re: Item J-1 - 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. Tax Map Key: (2) 4-5-005: 003.

Aloha Chairperson Case and Members of the Board of Land and Natural Resources,

This testimony is submitted on behalf of my clients Noio Charters, Inc. and Extended Horizons Inc. (collectively, "Permittees")¹ regarding agenda item J-1, the 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 (collectively, "Petitioners"). This contested case hearing request will be familiar to you, since on October 8, 2021, you also denied Petitioners' contested case request in connection with permits to these Permittees. Petitioners appealed your decision, and the appeal is pending before Judge Kawano in the Second Circuit. Then, even before you had a chance to consider this new contested case hearing request, Petitioners then went to court to file a second appeal challenging permits to these Permittees on January 5, 2022.² That second appeal is now also pending before Judge Kawano. We agree with DOBOR's recommendation that this petition for contested case hearing be denied.

permits for Mala Ramp, including Adventure Rafting and Ocean Riders.

¹ Agenda item J-1 also addresses permits for my other clients, Adventure Rafting, Inc. and Ocean Riders, Inc. My verbal remarks to the Board this Friday will be made on behalf of Noio Charters, Extended Horizons, Adventure Rafting and Ocean Riders. This written testimony addresses the particular issue of untimeliness of this contested case hearing request as to Noio Charters and Extended Horizons.

² Petitioners have also filed appeals with the Circuit Court of the Second Circuit for other commercial use

Chairperson Case and Members January 13, 2022 Page 2

This contested case request should be denied as untimely. Permittees' commercial use permits were renewed on November 19, 2021, and Petitioners did not submit their contested case request until November 22, 2021. Petitioners themselves must concede that their request is untimely and should be denied. In Petitioners' October 6, 2021 written testimony to the BLNR regarding their own failed and untimely challenge to other Mala Ramp commercial use permits, Petitioners acknowledged that the renewal or issuance of commercial use permits before the receipt of a contested case renders the request untimely ("Petitioners separately filed a contested case petition pertaining to the renewal or issuance of commercial use permits to Kā'anapali Beach Watercraft Rentals, Inc. and Pacific Jet Sports, Inc. As the DOBOR Submittal indicates, permits were issued prior to the receipt of the contested case request. Petitioners therefore do not contest the denial of their petition as to Kā'anapali Beach Watercraft Rentals, Inc. and Pacific Jet Sports, Inc."). On October 8, 2021, BLNR agreed and adopted DOBOR's recommendation to deny Petitioners' untimely contested case request as to permits that were already renewed. See DOBOR Submittal for Agenda Item J-1 on October 8, 2021 ("The CUPs for Kaanapali Beach Watercraft Rentals, Inc. and Pacific Jet Sports, Inc. were renewed before the CCH petitions were filed, and therefore, the CCH petitions as they relate to these two permits should be denied as untimely."). For the same reason, the instant contested case request should also be denied as untimely.

Most importantly, these multiple challenges place a heavy burden on Permittees, who have operated out of Maui for decades, and are small hardworking businesses that have complied with all permitting requirements. For these law-abiding small business owners, these repeated challenges to the renewal of commercial use permits are inappropriate. The Petitioners raise no issues specific to permits for these two particular Permittees, while instead focusing on general claims of overuse at Mala Ramp. While inappropriately focusing their challenges on law-abiding small business owners, Petitioners entirely ignore the unpermitted and illegal commercial uses at Mala Ramp.

What Petitioners really want is to change the overall commercial use at Mala Ramp, the extent of which was established by administrative rule more than two decades ago (*see* Haw. Admin. R. §12-231-67, limiting the number of commercial use permits at Mala Ramp to fifteen). An administrative rule cannot be changed through a contested case hearing (or through an administrative appeal from a denial of a contested case hearing). The previous contested case requests, raising substantially similar grounds regarding general overuse of Mala Ramp, were denied. This contested case request should similarly be denied.

Chairperson Case and Members January 13, 2022 Page 3

As requested by the Board, DOBOR has already established a working group to address issues regarding overall commercial activity at Mala Ramp. For the foregoing reasons, I request the Board deny Petitioners' request for a contested case hearing. Thank you for your consideration.

Mahalo,

GOODSILL ANDERSON QUINN & STIFEL

Lisa A. Bail

Attorney for Noio Charters, Inc. and Extended Horizon Inc.

LAB

From: Christina Lizzi
To: DLNR.BLNR.Testimony

Subject: [EXTERNAL] J-1 Comments for Board Meeting January 14, 2022

Date: Tuesday, January 11, 2022 8:34:10 PM

Attachments: 22.01.14 J-1 Ka Malu Comments with Exhibits 1-10.pdf

Good Evening:

Please find attached comments regarding agenda item J(1) for the Board's January 14, 2022 meeting. These comments are submitted on behalf of my clients, Ka Malu O Kahālāwai, Nā Papa'i Waewae 'Ula'Ula, Kekai Keahi, and Kai Nishiki.

Thank you,

Christina



Law Office of Christina Lizzi, LLLC

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LAW OFFICE OF CHRISTINA LIZZI, LLLC

62 N. Market St. Suite 309, Wailuku, HI 96793 Christina@Lizzi.Law | (808) 633-3966

January 11, 2022

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

Submitted via email to blnr.testimony@hawaii.gov

Re: Item J(1) – 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 Noio Charters, Inc., Extended Horizons, Inc., Adventure Rafting, Inc., and Ocean Riders, 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 January 14, 2022 Meeting Agenda Item J(1): "Denial of Petitions for Contested Case Hearing filed on November 22, 2021 regarding Renewal of Commercial Use Permits for Noio Charters, Inc., Extended Horizons, Inc., Adventure Rafting, Inc., and Ocean Riders, Inc. for Mala Launch Ramp, Maui."

This petition seeks contested case proceedings to protect Petitioners property interests that are threatened by issuance of specific commercial use permits to four entities: Noio Charters, Inc., Extended Horizons, Inc., ¹ Adventure Rafting, Inc., and Ocean Riders, Inc., ² Petitioners' threatened property interests include (1) their interest in the ability to engage in traditional and customary practices that are protected by article XII, section 7 of the Hawai'i State Constitution, and (2) their

Noio Charters and Extended Horizons permits, issued effective September 1, 2021 to December 31, 2021 have been "renewed" until August 31, 2022. See attached Exhibits 1-4. The permits retain the same number and are therefore the same permits that were issued effective September 1, 2021 as "temporary permits" and that have been "renewed" contrary to procedural requirements for a new application. These permits are currently the subject of appeal 2CCV-21-292 Ka Malu O Kahālāwai v. Board of Land and Natural Resources. To the extent that the State and permittees argue that any permits held by Noio Charters and Extended Horizons are "new" permits, Petitioners continue to assert they are entitled to contested case proceedings as to those permits, and that such permits were unlawfully granted. The Board could provide relief by instructing DOBOR to hold contested case proceedings and to uphold its affirmative duties under the Hawai'i State Constitution to protect the exercise of traditional and customary Native Hawaiian practices to the extent feasible with respect to these permits.

Petitioners have also filed an appeal from the unlawful issuance of the "temporary permits" to both Ocean Riders and Adventure Rafting without first disposing of the contested case petition or holding a contested case, among other claims. The Board could remedy this error and provide relief by instructing DOBOR to hold contested case proceedings and to uphold its affirmative duties under the Hawai'i State Constitution to protect the exercise of traditional and customary Native Hawaiian practices to the extent feasible with respect to these permits.

article XI, section 9 of the Hawai'i State Constitution right to a clean and healthful environment as defined by Chapter 200, Hawai'i Revised Statutes ("HRS") and administrative regulations pertaining to commercial use of State boating facilities and waters. These interests and the impacts to them are have been described thorough in the petition. These comments seek to provide clarification to the Board of issues raised by DOBOR's submittal, and alert the Board to the State's prior concessions regarding Petitioners' arguments for contested case proceedings, and to raise other points.

1. Petitioners Challenge the Specific Permits; Not the Underlying Regulations

Perhaps this point has been lost in prior petitions and testimony, and Petitioners hope that their comments today will bring greater clarity to the Board to understand Petitioners' position. The permits that have unlawfully already been issued to Noio Charters, Inc., Extended Horizons, Inc., Adventure Rafting, Inc., and Ocean Riders, Inc. enable their holders to unlimited use of Mala ramp.

The J-1 submittal before the Board is nearly identical to that of the J-1 submittal for the October 8, 2021 Board hearing. Both submittals recommend that the Board deny the petition for contested case hearing as to the issuance of Mala ramp commercial use permits because the petitions allegedly challenge a validly enacted regulation, HAR § 13-231-67.

The State's counsel has conceded, however, that Petitioners <u>did not</u> challenge HAR § 13-231-67 in the petition that the October 8, 2021 J-1 Submittal addressed. In two separate filings, State's counsel has stated:

"Significantly, Plaintiffs/Appellants Na Pāpa'i Wawae 'Ula'ula, Ka Malu O Kahālāwai, Kekai Keahi and Kai Nishiki's (collectively, "Petitioners") do not challenge the fifteenpermit cap set forth in HAR § 13-231-67." *See* State's Joinder to Defendant/Appellees Noio Charters, Inc. and Extended Horizons, Inc. Motion to Dismiss, filed January 3, 2022 (excerpt, Exhibit 8 – highlight added).

"The permit renewals at issue in this administrative appeal challenge two of the fifteen total allowed Permits at Mala Boat Ramp. Significantly, Petitioners do not challenge the fifteen-permit cap set forth in HAR § 13-231-67." State's Answering Brief at page 3, note 2, filed January 3, 2022 in Civil No. 2CCV-21-292 (excerpt, Exhibit 7 – highlight added).

The Petition today is no different. Petitioners' still do not challenge the validity of HAR § 13-231-67. The State has previously recognized that Petitioners, through seeking contested case proceedings on the issuance of specific commercial use permits, did not challenge HAR § 13-231-67. DOBOR characterizes the petition before the Board today as being the same as past petitions and recommends denial for all of the same reasons it did in past submittals. As the State has recognized,

the prior petitions did not challenge HAR § 13-231-67, and neither does the petition before the Board today. Therefore, the Board cannot credibly deny Petitioners a hearing on the basis that their petition challenges the validity of HAR § 13-231-67.

2. Petitioners Seek to Prevent Future Harm to Their Interests

Contested case proceedings are the means by which the legislature has afforded protections to those whose legal rights, duties, or interests may be harmed when an agency issues a permit to an applicant. The proceedings are intended to prevent harm and to balance competing interests before permits are issued and the permitted activity is undertaken. They are a critical tool for ensuring access to justice and necessary in many instances for effectuating due process. Hawai'i courts have also repeatedly held that standing should not be a barrier to protecting rights in the realm of environmental interests and Native Hawaiian traditional and customary practices. It should also be noted that costs to the government in providing such necessary fora may be reduced by an agency adopting streamlined rules for contested case proceedings, having a voluntary agreement with the Office of Administrative Hearings, as some agencies do, or hiring a permanent hearings officer to handle cases. The Board also has rules in place already that give a presiding hearings officer power to shape a hearing for efficiency. *See* HAR § 13-1-32(c) and (h).³ Once a contested case is granted, the Board may also encourage the parties to mediation. HRS § 91-8.5.

Because the purpose of contested case proceedings is to prevent harm rather than redress it, petitioners for contested case hearings are not required to prove that they have been harmed in the past to avail themselves of the protections afforded by contested case hearings from harms in the future. If petitioners were required to prove past harm, then, for example, in *Mauna Kea Anaina*

. . .

³ HAR § 13-1-32(c) and (h) state as follows:

⁽c) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. If the hearing is conducted by the board, the board members may examine and cross-examine witnesses.

⁽h) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue.

Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015) the petitioners who were entitled to contested case proceedings on the basis that the permit issuance enabling construction of a telescope threatened, among other things, their ability to engage in traditional and customary native Hawaiian practices would have had to demonstrate that the owner of the telescope had previously harmed them by building a telescope in the same location and negatively impacted their practices. The proposition is nonsensical, and no such requirement should be imposed on the petitioners before you now.

Even though it is unnecessary, Petitioners can point to how issuance of commercial use permits at Mala ramp has harmed them in the past. As discussed below, members of the Board have also recognized that there are "problems" at Mala wharf, including access for Native Hawaiian practitioners and overuse by commercial entities of the shared facilities. These problems are the result of specific permits being issued without conditions attached to guard against such harms. Petitioners thus now seek contested case proceedings regarding reissuance of permits to Ocean Riders, Adventure Rafting, Noio Charters, and Extended Horizons to ensure that the appropriate conditions are included to protect Petitioners' legal interests from future harm. The proceedings will also assist DOBOR to fulfill its affirmative duty under Article XII, section 7 of the Hawai'i State Constitution, as a fiduciary over public trust resources, and as to its duty to ensure permits are issued in accordance with HAR § 12-231-50.

3. Conditions May Be Imposed to Address Utilization of the Ramp, Overcrowded Parking Lots, and Other Pressures on Share Facilities

In previous proceedings and submittals regarding issuance of commercial use permits at Mala wharf, both DOBOR and the Board have suggested imposing such conditions on the permits to address issues such as the length of time and how frequently a permittee may utilize the ramp each day. *See* October 22, 2021 Submittal J-5 at 3, available at https://dlnr.hawaii.gov/wp-content/uploads/2021/10/J-5.pdf; October 8, 2021 submittal J-1 at 3, available at https://dlnr.hawaii.gov/wp-content/uploads/2021/10/J-1.pdf; recording of hearing from October 8, 2021, available at: https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-211008-1.m4a and https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-211008-2.m4a; recording of hearing October 22, 2021, available at: https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-211022-1.m4a and https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-211022-2.m4a (all accessed January 11, 2022) (collectively, "Past Submittals and Recording"). The State has suggested that conditions could be imposed to address parking and to require that business activities such as waiver signing and safety instruction occur outside of the ramp area. At the October 22, 2021 meeting, the

Board also instructed DOBOR to work with the community to come up with solutions, including such conditions, to address problems at Mala Wharf.

At the same time, DOBOR's submittal recommends the Board deny the petition because an unpublished disposition, *Young v. Coloma-Agaran*, 2001 WL 1677259, 2002 A.M.C. 1114 (D. Haw. 2001) allegedly prohibits such conditions from being imposed. Attached as Exhibit 9 is the unpublished disposition. Attached as Exhibit 10 is the federal court of appeals review of that decision, 340 F.3d 1053, 1055 (9th Cir. 2003), which affirmed the lower courts holding on different grounds. Neither case prohibits imposition of *conditions* to address land-based impacts of commercial use permits for the utilization of a State ramp. Rather, those cases prohibit an outright ban on commercial vessel activity. Petitioners seek no such thing. Moreover, the State ramp is on land and used to access State waters. The commercial use permit itself is not intended to regulate ocean-based activity but rather permits private use of a public recreational ramp for commercial tour companies to launch their trailered boats into the water. Each company in addition to a commercial use permit must also obtain a mooring permit and other permits for use of state waters.

The State cannot on one hand tell Petitioners to work with DOBOR through a "working group" to develop such conditions or represent that it will unilaterally impose such conditions, and on the other, deny Petitioners' request for a contested case on the basis that case law prohibits such conditions from being imposed. DOBOR's recommendation should therefore be denied.

4. DOBOR is Failing to Protect the Exercise of Traditional and Customary Native Hawaiian Practices to the Extent Feasible and to Mitigate Harms to the Public

DOBOR Administrator Ed Underwood's representations to this Board have not been consistent with DOBOR's actions. For example, DOBOR has asserted that it can and will place conditions on permits to address the concerns raised by Petitioners. *See* Past Submittals and Recording cited above. None of the permits, however, include any such conditions. Attached as Exhibits 1 -6 are copies of the permits issued to Ocean Riders, Adventure Rafting, Noio Charters, and Extended Horizons since August 30, 2021. This is not only frustrating to the community that relies on the agency to protect its interests, but contrary to DOBOR's constitutional obligations.

Article XII, section 7 of the Hawai'i State Constitution imposes an "affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights." Ka Pa'akai O Ka 'Aina v. Land Use Commission, 94 Hawai'i 31, 45, 7 P.3d 1068, 1092 (2000). Agencies must thus take into consideration the impacts of their actions on the reasonable exercise of Hawaiian traditions and practices and protect those rights "to the extent feasible." See Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 79 Hawai'i 425, 450 n.43, 903 P.2d 1246, 1271

n. 43 (1995). To protect those rights and fulfill their constitutional obligations, agencies must, at a minimum:

make specific findings of fact and conclusions of law as to the following: (1) the identity and scope of valued cultural, historical, or natural resources in the relevant area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the area; (2) the extent to which those resources -- including traditional and customary Native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect Native Hawaiian rights if they are found to exist.

In re Contested Case Hearing Re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 143 Hawai'i 379, 395, 431 P.3d 752, 768 (2018) as amended (Nov. 5, 2018 & Nov. 30, 2018), recon. granted in part, denied in part, 143 Hawai'i 327, 430 P.3d 425 (Table) (2018) and recon. denied sub nom. In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) HA-3568, 143 Hawaii 328, 430 P.3d 426 (Table) (2018) (citing Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084.) This analysis, referred to as the Ka Pa'akai analysis, must occur prior to the issuance of permits. Ka Pa'akai, 94 Hawai'i at 52, 7 P.3d at 1089 (holding the Land Use Commission failed to satisfy its statutory and constitutional obligations by failing to identify and ensure Hawaiian practices would be protected prior to permit issuance and that agency impermissibly delegated its duty). Failure to engage in this inquiry provides sufficient grounds for invalidating the issuance of a permit as being in excess of an agency's authority. See id.

The J-1 January 14, 2022 does not provide any analysis as required by *Ka Pa'akai*, nor is any such analysis included in the permits. The impact of commercial use permits on traditional and customary native Hawaiian practices at Mala wharf has been brought to DOBOR's and the Board's attention for over six months now. Permits are still being issued without any protections. No contested case hearing petitions have been granted. Petitioners' right to exercise traditional and customary practices continues to be impeded, as do that of others who engage in traditional and customary Native Hawaiian practices at Mala wharf.

DOBOR also cannot reasonably continue to claim that issuance of the permits without any conditions included to ensure that such permits do not enable overuse of shared facilities of Mala ramp by the permittees meets the requirement of HAR § 13-231-50 that issuance of the permits provide "corresponding and reasonable" benefits to the public. Board members at the October 22, 2021 meeting stated repeatedly that they understood there were "problems" at Mala Wharf, that access of Native Hawaiian practitioners, as well as the general public, was being impacted by commercial overuse of the shared facilities, i.e., the ramp, trailer parking, general parking, etc. The

public is not being protected by issuance of the specific permits because no conditions are being imposed to address known harms. DOBOR also fails to note in its submittal describing the process for issuing commercial use permits for the ramp that the issuance must also comply with HAR § 12-231-50 by providing corresponding and reasonable benefits and returns to the public. *See* J-1 January 14, 2022 submittal at 2.

5. The Process of Issuing Temporary Permits and the Extending Them is Unlawful

HAR § 13-231-5 permits DOBOR to issue commercial use permits "for any period up to, but not exceeding one year." HAR § 13-231-5. The reissued permits are not interim or temporary as the regulations do not allow for "interim" or "temporary" commercial use permits. *See* HAR § 13-231-5; J-1 submittal for January 14, 2022 at 2. DOBOR does not have authority to act outside of the authority it has been given without rulemaking, and the Board should take corrective action to address the unlawful and premature issuance of the permits, prior to disposing of the contested case petition. Rather, DOBOR reissued the Companies' commercial use permits for a period of three-months, as permitted by HAR § 13-231-5, rather than the maximum twelve-months. The process of issuing permits prior to disposing of contested case petitions, sending the petition to the Board for review, and then extending those permits without providing notice to Petitioners or otherwise claiming that the permits have already expired and pending claims are moot, only serves to evade judicial review of permit issuance and the denial of contested case proceedings, while protecting business interests.

6. DOBOR/the Board Was Required to Hold a Contested Case Hearing Prior to Permit Issuance

DOBOR's issuance of the permits without transmitting the petition to the Board for review first was unlawful and denied Petitioners' due process. The Board had a scheduled meeting on December 10, 2021, at which the petitions could have been considered. Petitions for contested case hearings must be decided upon prior to permit issuance. See Community Ass'n of Hualalai v. Leeward Planning Comm'n, SCOT-16-0000690 (Haw. Dec. 2, 2021) (slip op.) (holding Commission could not withdraw a permit application without disposing of contested case petition first); Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015) (holding Board's failure to hold a contested case hearing prior to issuance of a conservation district use permit for a proposed telescope facility, where appellants alleged their ability to engage in traditional and

contrary to the requirements of HAR § 13-231-5.

7

⁴ If the Companies desire permits beyond that expiration date, then DOBOR must process an application for renewal of the permits. The permits may not simply be "extended" beyond the expiration date without a new application, which is

customary practices on Mauna Kea would be impacted by issuance of the permit, denied appellants due process.) Petitioners' have asserted and demonstrated that (1) their interest in the ability to engage in traditional and customary practices that are protected by article XII, section 7 of the Hawai'i State Constitution, and (2) their article XI, section 9 of the Hawai'i State Constitution right to a clean and healthful environment as defined by Chapter 200, HRS and administrative regulations pertaining to commercial use of State boating facilities and waters, are impacted by permit issuance. Due process required a hearing prior to permit issuance to prevent harm to Petitioners' interests. Petitioners' participation in a working group to address overall concerns at Mala Wharf does not provide due process with respect to the issuance of specific permits.⁵

7. The Board May Not Delegate Authority to the Chair

The Board may only delegate authority to the Chair to summarily deny contested case petitions through rulemaking. If the Board has a policy of delegating summary denial of petitions for contested cases, then that rule was adopted outside of an adjudication. It therefore cannot be considered as rulemaking through adjudication.

Conclusion

For the reasons set forth in the petition as well as testimony that will be presented at the January 14, 2022 hearing, Petitioners assert and have demonstrated that the commercial use permit issuances will impact Petitioners' property interests and that Petitioners would be "so directly and immediately affected by the requested action that their interest in the proceedings is clearly distinguishable from the general public." *See* HAR § 13-1-31(b)(2). Petitioners are entitled to contested case hearings based on HAR § 13-1-31(b)(2) as well as constitutional due process. To date, Petitioners have been denied due process. The Board may provide relief by denying DOBOR's recommendation and granting the petition.

Dated: Wailuku, Hawai'i January 11, 2022

Christina Lizzi, Esq.

Law Office of Christina Lizzi, LLLC

Attorney for Petitioners

Based on what has been shared with Petitioners to date, the Working Group is entirely advisory and DOBOR has complete discretion over whether to proceed on any recommendations made by the group. The group is not focused on specific permit holders and addresses various user groups at Mala Wharf. There is no opportunity for judicial review of DOBOR's decisions to adopt or deny recommendations of the working group.

EXHIBIT 1
Extended Horizons
Permit # 20-92982
9/1/21 -12/31/21

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

RENEWAL

Type	of Commercial Operatio	15:	
	[] Commercial Use F [x] Commercial Ramp [] Vessel Moored Els	Permit	
Date:	3/20/21	Permit No.: <u>20-92982</u>	Account No.: <u>9672</u>
comm Maui	ercial activities (on sig , the Ocean recreation n	nature page) on the ocean waters of the	to as the Permittee) to conduct the describe e State of Hawaii located on the island of gement area, to commence on 09/01/2021
Copie	s of the following exhibi	ts are submitted for review and the record	d (if applicable):
	[] Letter of Permissic [×] Certificate of com	n from Land Owner for Access to the State nercial insurance policy naming the State e limits and meeting all other requirement	nte Ocean Waters of Hawaii as an additional insured, containing ts as outlined in Hawaii Administrative Rules
	[x] Certificate of Com [] Partnership, Joint V [] PUC for vehicle(s)	pliance from the Hawaii Department of T Venture, Corporate Exhibits , if applicable	
	[x] Certificate of Inspe	ction for any vessels used in your comme	ercial operation, if applicable.

- 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.
- 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.
- 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: Extended Horizons Inc. 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. <u>Business Practices & Records</u>: 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 Account 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. <u>Time of Payment</u>: 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.

8.	Vessel Information:		
	Vessel Name: EXTENDED HORIZONS II Vessel Registration: DOC. 1020692 / Exp. 08	3/2021	COI Exp. 04/22/2022 Vessel Length: 31' 6"
9.	Restrictions:		
	Sites:		
	SEE ATTACHED LIST		
	Activity:		
	SCUBA DIVING CHARTERS		
	•		
	•		
Ac	ldress: 94 Kupuohi St. A1 Lahaina, HI 96761	Email Addres	s: accounting@extendedhorizons.com
Bu	isiness Phone: (808) 667-0611	Cellular Phon	e:
Sig	gned by (Authorized Representative)	if Jer	
D.	int Name ERIK M STEIN - PRESIDENT		2/-1
Eti	EXTENDED HORIZONS INC.		0/2-121
	EXTENDED HORIZONS INC.		Date Signed: 8/30/21
	EXTENDED HORIZONS INC.		Date Signed: 8136/21
	EXTENDED HORIZONS INC.		LAND AND NATURAL RESOURC
	EXTENDED HORIZONS INC.	DEPARTMENT OF	LAND AND NATURAL RESOURC
	EXTENDED HORIZONS INC.	DEPARTMENT OF DIVISION OF BOAT	LAND AND NATURAL RESOURC TING AND OCEAN RECREATION BREW
	EXTENDED HORIZONS INC.	DEPARTMENT OF DIVISION OF BOAT BY: ROBERT T. AB	LAND AND NATURAL RESOUR TING AND OCEAN RECREATIO

DAVID Y. IGE GOVERNOR OF HAWAII





SSUZANNE D. CASE CHAIRPERSON BOARD OF LAND AND NATURAL RESOURCES COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K.MASUDA

M. Kaleo Maluel DEPUTY-DIRECTOR - WATER

Edward R. Underwood ADMINISTRATOR BOATING & OCEAN RECREATION

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

675 Wharf Street Lahaina, Hawaii 96791

Permit # 20-40755

Mala Commercial Permit #: MALA-18

Account #: 0009672

Rules and Regulations

RENEWAL

I agree to the following terms, conditions and charges:

- 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:

□ Mooring	.,,,,,,,\$	
☐ Electricity	\$	
☐ Gear Locker	\$	
☐ Security Deposit	\$	
₫ Other Ramp	\$	300.00
☐ 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.
- 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 ____09/01/2021 ____(date) and the mooring privilege under this permit terminates on ____12/31/2021 ____(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 t 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.

Permittee Signature: Date

EXTENDED HORIZONS INC.

Printed Name of Permittee: ERIK M. STEIN- PRESIDENT

Address

City, State, Zip

Lahaina, HI 96761

Thome Phone Cell

Approved by: Work Phone

Robert T. Abrew: Harbor Agent II

Department of Land and Natural Resources
Division of Boating and Ocean Recreation

EXHIBIT 2 EXTENDED HORIZONS, INC.

Permit # 20-92982 "11/19/21" - 8/31/2022

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

1st REVISION/RENEWAL

COMMERCIAL OPERATIONS PERMIT MALA COMMERCIAL RAMP PERMIT# 18 Type of Commercial Operations:

[] Commercial Use	. Down it	
[x] Commercial Rar	np Permit	
[] Vessel Moored [Elsewhere (VME)	
Date: 11/19/2021	Permit No.: 20-92982	Account No : 96

This permit authorizes Extended Horizons Inc. (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 11/19/2021 and expires on 08/31/2022 unless terminated for cause.

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

[x] Vessel Documentation and/or Vessel Registration "Extended Horizons II" Exp 8/31/2022 [] Vessel Inspection or Approved Marine Surveyor
[X] General Excise Tax License On file
[X] DCCA Certificate of Good Standing HCF Compliance detect 7/12/2021
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 Exp. 08/15/2022
 Certificate of Compliance from the Hawaii Department of Taxation Dated 7/12/2021 Partnership, Joint Venture, Corporate Exhibits PUC for vehicle(s), if applicable
[x] Certificate of Inspection for any vessels used in your commercial operation, if applicable. Temp Exp 4/27/2022

Account No.: 9672

- The Permittee agrees to abide by all applicable Federal, State, and County laws and all boating and shore 1. 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.
- The Permittee agrees to operate the vessel or equipment described in this permit in accordance with all 2. applicable rules and regulations regarding passenger-carrying capacity and commercial vessel activities.
- When applicable, the Permittee agrees to present proof, upon request, of Coast Guard certification for the 3. vessel(s) registered with the Department.
- The fee for this commercial use permit will be as follows: 4.
 - 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, 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.
- 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.
- 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: Extended Horizons Inc. 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. <u>Business Practices & Records</u>: 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 Account 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. <u>Time of Payment</u>: 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.

	Vessel Information:	
	Vessel Name: EXTENDED HORIZONS II Vessel Registration: DOC. 1020693 / Exp. 0	Vessel Length: 32' 6"
19.	Restrictions:	
	Sites:	
	SEE ATTACHED LIST	
	Activity:	
	SCUBA DIVING CHARTERS	
	•	
	•	
	•	
	·	
	AGREE TO THE TERMS, CONDITIONS AN	
Ad	ddress: 94 Kupuohi St. A1 Lahaina, HI 96761	Email Address: accounting@extendedhorizons.com
Ad	ldress: 94 Kupuohi St. A1	
Ac Bu	Iddress: 94 Kupuohi St. A1 Lahaina, HI 96761 usiness Phone: (808) 667-0611	Email Address: accounting@extendedhorizons.com
Ac Bu	ddress: 94 Kupuohi St. A1 Lahaina, HI 96761 usiness Phone: (808) 667-0611 gned by (Authorized Representative)	Email Address: accounting@extendedhorizons.com
Ac Bu Sig	ddress: 94 Kupuohi St. A1 Lahaina, HI 96761 usiness Phone: (808) 667-0611 gned by (Authorized Representative) unt Name EXTENDED HORIZONS INC.	Email Address: accounting@extendedhorizons.com
Ac Bu Sig	ddress: 94 Kupuohi St. A1 Lahaina, HI 96761 usiness Phone: (808) 667-0611 gned by (Authorized Representative)	Email Address: accounting@extendedhorizons.com Cellular Phone: 808-870-6363

Date: 11/19/2021

EXHIBIT 3

Noio Charters, Inc. Permit # 20-92982 9/1/21 - 12/31/21

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

RENEWAL

MALA RAMP COMMERCIAL PERMIT #13

Type o	of Commercial Operations:		
	[] Commercial Use Permit [X] Commercial Ramp Permit [] Vessel Moored Elsewhere ((VME)	
Date:	08/30/2021	Permit No.: 20-104046	Account No.: 9030
describ custom manag	be commercial activities such a ne charters on the ocean waters of	RTERS, INC. (hereinafter referred to as, Snorkeling, Sightseeing, Whale Worf the State of Hawaii located on the is anagement area, to commence on <u>09/0</u>	/atching, Trips to Lanai, West and land of Maui, the Ocean recreation
Copies	s of the following exhibits are sul	bmitted for review and the record (if ap	plicable):
	[] Vessel Inspection or Appro	e On file Standing Land Owner for Access to the State Oce nsurance policy naming the State of Ha and meeting all other requirements as or 03/1/2022 from the Hawaii Department of Taxation Corporate Exhibits cable	ean Waters waii as an additional insured, containing utlined in Hawaii Administrative
I.	water rules promulgated by the addition to any fines or pena aforementioned laws or rules i Resources Division of Boating and the vessel or operation sha	e Department of Land and Natural Resonanties a court of law may impose, and may cause this permit to be terminated and Ocean Recreation (the "Department of the Immediately cease commercial activities.")	County laws and all boating and shore surces (referred to as the Department). In my violation(s) of the provisions of the by the Department of Land and Natural mt) by written order of its Representative, ity. Issuance of a commercial use permit ine or conduct commercial activities on
2.		rate the vessel or equipment described s regarding passenger-carrying capacity	d in this permit in accordance with all and commercial vessel activities.
3.	When applicable, the Permitte vessel(s) registered with the De		est, of Coast Guard certification for the
4.	The fee for this commercial use	e permit will be as follows:	
		erating from state land: The cost for a ross receipts, whichever is greater.	commercial use permit shall be \$300.00

the first day of each month.

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

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.
- 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.
- 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: NOIO CHARTERS, INC. 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. <u>Business Practices & Records</u>: 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 Account 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. <u>Time of Payment</u>: 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.	Vesse	Information:			
		Vessel Name: CANE Vessel Registration:		/2021	Vessel Length: 35'
19,	Restri	ctions:			
	Sites:				
	٠	Lanai, West Maui	and various locatio	ns	
	Activi	ty:			
		Snorkeling			
		Sight seeing			
		Whale watching			
		Trips to Lanai, We	est Maui and Demis	se charters	
1 /	AGREE	TO THE TERMS, CO	ONDITIONS AND	CHARGES:	
	ddress:	TO THE TERMS, CO PÒ BOX 12492 Lahaina, HI 96761	ONDITIONS AND		ail Address: office@captainsteves.com
Ac	ddress:	PO BOX 12492		Em	
Ac Bu	ddress: usiness	PO BOX 12492 Lahaina, HI 96761		Em	ail Address: office@captainsteves.com
Ac Bu Sig	ddress: usiness gned by	PÒ BOX 12492 Lahaina, HI 96761 Phone: <u>(808) 661-0818</u>	itative)	Em Cel	ail Address: office@captainsteves.com
Ac Bu Sig	ddress: usiness gned by	PO BOX 12492 Lahaina, HI 96761 Phone: (808) 661-0818 (Authorized Represer	itative)	Em Cel State Of DEPARTM	ail Address: office@captainsteves.com Jular Phone: (808) 667-5565 Maly

Date: 8/30/2021

DAVID V. IGE.





STZANNE B. CASE

LIMBER SOFF

CONSTRUCTOR OF MALESTAN MANAGEMENT

ROBERT K. MASUDA

ROBERT K. MASUDA

M. KALEO MANTEL

EDWARD R, UNDERWOOD

ADMINISTRAÇÃO

INVESTIGAÇÃO

INVESTIG

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

675 Wharf Street Lahaina, Hawaii 96791 Permit # 20-104046

Mala Commercial Permit #: 13 Account #: 9030

Rules and Regulations

RENEWAL

I agree to the following terms, conditions and charges:

- 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.
- 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:

☐ Mooring	\$	
☐ Electricity		
☐ Gear Locker	\$\$	
☐ Security Deposit	\$	
d Other Ramp	\$	300.00
☐ 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 ____09/01/2021 ____(date) and the mooring privilege under this permit terminates on ____12/31/2021 ____(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 t 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.

Permittee Signature

NOIO CHARTERS, INC.

Printed Name of Permittee - Steven A Lawless, President

Address P.O. BOX 12492

City, State, Zip LAHAINA, HI 96761

and/or 808 667 5565

Home Phone Steve's Cell # Work Phone

Approved by: Department of Land and Natural Resources

Division of Boating and Ocean Recreation

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

COMMERCIAL USE QUESTIONNAIRE

Company Name: _	NOIO CHARTERS I	NC		
Company Representa	tive Name/Title: S	TEVE LAWLESS	- PRESIDENT	
Complete Address:	PO BOX 12492			
	LAHAINA, HI 96761			
Office #:808 667-	5565	Cell #:		
Email: office@c	captainsteves.com			
	where you are proposir ocation and what equip		nmercial activity, the spece utilizing. Equipment	cific
Lanai, West Maui and Various locations	Snorkeling		Vessel	
Maui County Waters	Whale Watchi	ing	Vessel	

3.	How do you plan to access the water? (Please indicate for each location whether you are accessing through private or public land, state or county, etc.)					
	State Harbors, Mala	a Ramp				
1.	•	d of access for any of the	e locations at which you wer(s)?	ant to operate require		
	× Yes	No				
5.		question 4 above was "js the issuing entity?	yes", what type of permit/p	permission do you		
	Location	Landowner Name of Individual or Entity	Type of Permit/Permission Include any Permit #'s if applicable	Telephone Number Best contact for the issuing entity		
	Mala Wharf Ramp	DLNR Boating	Commercial Use Ramp	808 662-4060		

6.	Please submit the following documents concurrently with your commercial use permit application for the division's review:				
$[\times]$	J General Excise Tax License				
$ \times $	Commercial General liability insurance policy with sufficient coverage limits & naming the State of Hawaii as an additional insured per Hawaii Administrative Rules 13-231-65.				
1.1	Certificate of Good Standing from Hawaii Department of Commerce and Consumer Affairs (DCCA, BREG), if applicable				
$[\times]$	Certificate of Compliance from Hawaii Department of Taxation				
1.1	Letter of Permission from Land Owner for Access to the State Ocean Waters				
1.1	Articles of Incorporation or Articles of Organization, if applicable				
L1	PUC for vehicle(s), if applicable				
$[\times]$	Vessel Certificate of Inspection or approved marine survey, if applicable				
11	Other:				
Applic	ant's Signature: Studialus Date: 8/30/21				
	NOIO CHARTERS, INC Steven A Lawless, President				
	DOBOR STAFF				
Date R	eviewed: 08/30/2021				
	ved By: Dayrelle M. How Title: TA / HARBOR AGENT IV, LAHAINA HARBO				
Recon	DAYNETTE M FLORES immendations or Remarks:				
Last Upd	ated 10/23/2020				

EXHIBIT 4
NOIO CHARTERS, INC.
Permit # 20-104046
"11/19/21" - 8/31/2022

1ST REVISION / F		PERMIT
Type of Commercia	MALA COMMERCIAL RAM al Operations:	MP PERMIT #13
Comme Comme	ercial Use Permit ercial Ramp Permit Moored Elsewhere (VME)	
Date: 11/19/2021	Permit No.: <u>20-104046</u>	Account No.: 9030
charters on the oce	rizes NOIO CHARTERS, INC. (hereinafter real activities such as, Snorkeling, Sightseeing, Whalean waters of the State of Hawaii located on r non-designated management area, to commence or cause.	le Watching, Trips to Lanai, West and custom
Copies of the follow	ing exhibits are submitted for review and the reco	rd (if applicable):
General General Certificat Sufficien Rules Certificat Partnersh Gertificat Certificat	ee agrees to abide by all applicable Federal Sta	tate Ocean Waters te of Hawaii as an additional insured, containing nts as outlined in Hawaii Administrative Taxation Dated 7/26/2021 nercial operation, if applicable. Temp COI Exp 4 /20/22
addition to a aforemention Resources D	promulgated by the Department of Land and Naturany fines or penalties a court of law may imped laws or rules may cause this permit to be termivision of Boating and Ocean Recreation (the "Deel or operation shall immediately cease commercials does not great you transit sinks.	al Resources (referred to as the Department). In cose, any violation(s) of the provisions of the ninated by the Department of Land and Natural

- from DOBOR does not grant you transit rights to access the shoreline or conduct commercial activities on shore.
- The Permittee agrees to operate the vessel or equipment described in this permit in accordance with all 2. applicable rules and regulations regarding passenger-carrying capacity and commercial vessel activities.
- When applicable, the Permittee agrees to present proof, upon request, of Coast Guard certification for the 3. vessel(s) registered with the Department.
- 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.
- 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.
- 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.
- 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: NOIO CHARTERS, INC. 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. <u>Business Practices & Records</u>: 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 Account 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. <u>Time of Payment</u>: 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: CANEFIRE II Vessel Registration: 1198037 exp 5	5/31/2022 Vessel Length: 35'
19.	Restrictions:	
	Sites:	
	• LANAI, WEST MAUI AND VARIOUS LOCA	TIONS
	Activity:	
	• SNORKELING	
	SIGHT SEEING	
	• WHALE WATCHING	
	TRIPS TO LANAL WEST MAULAND DEMIS	SE CHARTERS
	•	
	AGREE TO THE TERMS, CONDITIONS AN Idress: PO BOX 12492 Lahaina, HI 96761	ND CHARGES: Email Address: office@captainsteves.com
Bu	siness Phone: (808) 661-0818	Cellular Phone: (808) 667-5565
Sig	ned by (Authorized Representative)	in Shark
Prii	nt Name NOIO CHARTERS, INC STEVEN A LAWLESS - PRESIDE	Date Signed: 1(/19/2)
		STATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES DIVISION OF BOATING AND OCEAN RECREATION
		BY: DAYNETTE M FLORES
		Printed Name TA HARBOR AGENT IV

BY: Dayreth M. Horrs Signature

Date: 11/19/2021





675 Wharf Street Lahaina, Hawali 96791

STATE BARKS Permit # CM 20-104046

SUZANNE D. CASE

CHAIRPERSON BEARD OF LAND AND NATURAL RESOURCES COMMISSION ON WATER RESOURCE MANAGEMENT ROBERT K. MASUDA M.KALEO MANUEL

AOUNTE RESURCES
BOATING AND OF AN BECREATION
RUBEAT OF CONSTRAINES
COMMISSION OF WATER RESURCE
MANAGEMENT
CONSERVATION AND CONSTRAINE
FNOOREMENT

FNGINFERING
FORESTRY AND WILDLES
BISTORIC PRESERVATION
EAHOOF AWE ISLAND RESERVE COMMISSION
LAND

Mala Commercial Permit #: 13 Account #: 9030

Rules and Regulations

1ST REVISION/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:

☐ Mooring		\$	
☐ Electrici	ty	\$	
☐ Gear Lo	cker	\$	
☐ Security	Deposit	\$	
√ Other	Ramp	\$ 300.00	
☐ Other		\$	
Monthly P	ayment	\$ 300.00	51

- 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 11/19/2021 (date) and the mooring privilege under this permit terminates on 08/31/2022 (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 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.

	11/19/2021
Permittee Signature	Date
NOIO CHARTERS, INC	
Printed Name of Permittee ST	TEVEN A LAWLESS-Pres.
Address PO Box 12492	
City, State, Zip LAHAINA HI	96761
808-283-9940 and/c	or 808-667-5565
Home Phone	Work Phone
Approved by: Dayny	11-1-16
Department of I	and and Natural Pecourse
Department of L	and and Natural Resource
Department of L Division of Boati	and and Natural Resource ng and Ocean Recreation res, TA Harbor Agent IV

1.51

SIATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES. DEVISION OF BOATING AND OCEAN RECREATION.

COMMERCIAL USE QUESTIONNAIRE

1	. 111	111-1-11	MILLE
,	3.55	1 11151	201112

NOIO CHARTERS INC.

Company Representative Name Title: STEVE LAWLESS - PRESIDENT

Complete Address

PO BOX 12492

LAHAINA TH 96761

Office : 808387-5585

Cell : 808 253 9940

timuil:

office@captamsteves.com

I. What typess of commercial activity do you propose to conduct

Shorkeling Sightseeing Whale watching trips to Lamb West Mour and Demise charters

5. I ist all locations where you are proposing to conduct commercial activity, the specific activity for each location and what equipment you will be utilizing:

Location	Activity	Equipment
Lana - Vrest Machand Valerus focações	Snorke mg	Vossa
Mau General Waters	Virale Water ug	- Vesser
		·
	4	

4. How do you plan to access the venter? (Please indoor, for each location whether you are accessing through private or public land, state or county, etc.)

State Hatto & Clark Rame

1. Does your method of access for any of the locations at which you want to operate require a permit or permission from the landowners (.)

× 10 Va

4. It your answer to question 1 above was "yes", what type of permit permission do you possess and who is the issuing entity.

Location	Landowner Name of Individual or Entity	Type of Permit Permission bichole any Permit is it applicable	Lelephone Nu Best contact to issuing entity	mber or the
Mus Whent Raz o	DINR Boam a	Commercial Has Ramp	3 8 952 4060	1
			± ± ± ± ± ± ± ± ± ± ± ± ± ± ± ± ± ± ±	1
			i	Į
			-	
		· ·		- 2

EXHIBIT 5
OCEAN RIDERS, INC.
Permit # 20-126690
1/1/22 - 3/31/22

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

RENEWAL

COMMERCIAL OPERATIONS PERMIT
MALA COMMERCIAL RAMP - # 22

Type of Commercial Operations:	THE CONTROL TO WATER AT ZZ	
[] Commercial Use Permit ★ Commercial Ramp Perm [] Vessel Moored Elsewhe	nit	
Date: <u>12/28/2021</u>	Permit No.: 20-126690 / MALA COMM #22	Account No.: 9031
describe commercial activities such island of <u>Maui</u> , the Ocean recre	Riders, Inc. (hereinafter referred to as the Permitter as Snorkel Charter on the ocean waters of the State of Ha eation management area or non-designated management as 3/31/2022 unless terminated for cause.	waii located on the
Copies of the following exhibits are	submitted for review and the record (if applicable):	
[] Vessel Inspection or App ☐ General Excise Tax Lice [] DCCA Certificate of Go	ense On File od Standing	//31/2022
Certificate of commercia sufficient coverage limit Rules §13-231-65 E	m Land Owner for Access to the State Ocean Waters al insurance policy naming the State of Hawaii as an addition its and meeting all other requirements as outlined in Hawaii AExp 06/30/2022	Administrative
[] Partnership, Joint Ventur [] PUC for vehicle(s), if ap	plicable	
Certificate of Inspection	for any vessels used in your commercial operation, if applic	able. Exp 01/23/2025

- 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.
- 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: OCEAN RIDERS INC. 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. <u>Business Practices & Records</u>: 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 pennit 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 Account 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. <u>Time of Payment</u>: 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: WAILAU Vessel Registration: HA 1011 CP E	xp 07/22	Vessel Length: 28' 6"
19.	Restric	etions:		
	Sites:			
	•	SEE ATTACHED LIST		
	Activit	y:		
	• <u>Si</u>	NORKEL CHARTERS		
	•		<u>-</u>	
	•			
	. –			
	. –			
ΙA	GREE 7	TO THE TERMS, CONDITIONS AN	D CHARGES:	
Ad		<u>O BOX 967</u> ahaina <u>, HI 96767</u>	Email Addr	ess: mauioceanriders@gmail.com
Bu	siness Pl	none: <u>(808) 661-3586</u>	Cellular Pho	one:
Sig	gned by (Authorized Representative)	(in	Bui
Pri	nt Name	OCEN RIDERS INC. CHAD BLAIR - PRESIDENT		Date Signed: 12/28/2021
				III F LAND AND NATURAL RESOURCES ATING AND OCEAN RECREATION
				M FLORES Harbor Agent IV, Lahaina Harbor M. Thorro

Date: 12/28/2021





675 Wharf Street Lahaina, Hawaii 96791

Rules and Regulations

SUZANNE D. CASE CIAIRFERSON BOARD OF LAND AND NATURAL RESOURCES COMMISSION ON WATER RESOURCE MANAGEMENT ROBERT K. MASUDA

FIRST DEPUTY DIRECTOR-LAND
M.KALEO MAUEL
DEPUTY DIRECTOR -WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL EMPORCEMENT
ENGINEERING
FORESTRY AND WILLDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Permit #_CR_20-126690

MALA COMMERCIAL RAMP #22

Account #: 9031

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:

Monthly Payment	\$ 300.00	
☐ Other	\$ 	(A-
∕ Other Ramp	\$ 300.00	æ
☐ Security Deposit	\$ 	
☐ Gear Locker	\$ 	
☐ Electricity	\$ 	
☐ Mooring	\$ 	

- 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.
- 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.

(wig ci	12/28/2021
Permittee Signature	Date
OCEAN RIDERS INC. CHAD BLA	AIR - PRES.
Printed Name of Permittee Permittee	Name & Title
Address PO BOX 967	
City, State, Zip LAHAINA, HI 9676	7
808 661-3586 and/or	
Home Phone Cell Work	Phone
Approved by: Department of Land and Division of Boating and Company	

Daynette M Flores, TA Harbor Agent IV

COMMERCIAL USE QUESTIONNAIRE

Company Name: OCEAN	MUDONUS, (NC.	
Company Representative Name	Title: CHAD BLAIR	/ PNESIDONT
Complete Address:	Box 967	
	HAINA, HI 96267	
Office#: 808 661 358	ر Cell #: _	
Email: Mavioceanside	ers Ramail.com	
•	J 1 *	
777 () () () () () () () () ()	1 - 41: 14: 4 to conduc	+ SNANNE CHARTE
. What type(s) of commercial	l activity do you propose to conduc	E. DIONEAGE CONTROL
Tigt all locations where you	are proposing to conduct commer	cial activity, the specific
	are proposing to conduct commer	
activity for each location an	nd what equipment you will be utili	zing. Equipment
activity for each location an	Activity	Equipment UE劣をいいみしない
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activity for each location an	Activity	Equipment UE劣をいいみしない
activity for each location an	Activity	Equipment UE劣をいいみしない

	How do you plan to access the water? (Please indicate for each location whether you are accessing through private or public land, state or county, etc.)
	MALA CAUNCH RAMP / CAHAINA, 177
4.	Does your method of access for any of the locations at which you want to operate require a permit or permission from the landowner(s)?
	No

5. If your answer to question 4 above was "yes", what type of permit/permission do you possess and who is the issuing entity?

Location	Landowner Name of Individual or Entity	Type of Permit/Permission Include any Permit #'s if applicable	Telephone Number Best contact for the issuing entity
MALA LAUNCH RAMP	STATE OF HAWAII DLNR/BOR	MARA COMMERCIAL PORMIT #22	808 GA 4068

6.	Please submit the following documents concurrently with your commercial use permit application for the division's review:
[/]	General Excise Tax License
內	Commercial General liability insurance policy with sufficient coverage limits & naming the State of Hawaii as an additional insured per Hawaii Administrative Rules 13-231-65.
€ J	Certificate of Good Standing from Hawaii Department of Commerce and Consumer Affairs (DCCA, BREG), if applicable
M	Certificate of Compliance from Hawaii Department of Taxation
[]	Letter of Permission from Land Owner for Access to the State Ocean Waters
[]	Articles of Incorporation or Articles of Organization, if applicable
[]	PUC for vehicle(s), if applicable
K)	Vessel Certificate of Inspection or approved marine survey, if applicable
[]	Other:
Applic	ant's Signature: Date: 11/23/202/
	DOBOR STAFF Leviewed: 12/28/21 wed By: Day w M. How Title: TB Harbor Argent IV
Reviev	wed By: Day will M. How Title: The Harber Agent IV
Recom	mendations or Remarks:
Last Upd	ated 10/23/2020

EAST FACINE SHORELIME OF LANAI INCLUDING NAHA, LOPA BEVACH, KEGMUKU VICLACE, CLUBCANAI, STONESHACK, CONTAINERS, KALOLOHLA

NONTH FACING SHORE OF CANAI INCUDING SHIPWRITCK, SHIPWRECIZ BETACIA, POLIHUABEACH,

WEST FACING SCHONELINE OF LANA INCLUDING, KA'OWA POINT, KE'ANAPAPA POINT, COWRY, HONOPU BAY, NANAHOA, KAUMALAPAN HAMBON, SCHANKFIN ROCK, LIGHTHOUSE

SUPH FACING SHONERINE OF CANAL INCUDING, CAPITERACS, 2nd CATHEDUALS, SWEETHEART ROCK, MANGE NARROW, ARMCHAIR

SHONELINE OF WEST MAU INCUDING OLUWALU, PAPALAUA, LANIAPOKO, BLACKICK, MALA PIEN, SLAUGHTEN HOUSE, HONDLUA BAY, CLIFFHOUSE, COME EARICOUS

EXHIBIT 6 ADVENTURE RAFTING, INC. Permit # 20-126744 1/1/22 - 3/31/22

COMMERCIAL OPERATIONS PERMIT

MALA COMMERCIAL RAMP # 01

Type of Commercial Operations:

RENEWAL

	[] Commercial Use Permit Commercial Ramp Permit [] Vessel Moored Elsewhere (VME)	
Date:	12/29/2021	Permit No.: <u>20-126744</u>	Account No.: <u>14789</u>
the de of the	scribe commercial activities such State of Hawaii located on th	n as Snorkeling, Whale Watchin e island of <u>Maui,</u> the Ocean	referred to as the Permittee) to conduct ag, and Charter Fishing on the ocean waters recreation management area or non-pires on 03/31/2022 unless terminated for
Copies	Vessel Inspection or Approv General Excise Tax License DCCA Certificate of Good S	or Vessel Registration "Sweet wed Marine Surveyor Exp 6/21/2 On file	Life" Doc#1152641, Exp 5/31/2022 2023
	Certificate of commercial in	surance policy naming the State nd meeting all other requiremen	e of Hawaii as an additional insured, containing ts as outlined in Hawaii Administrative
	[] Certificate of Compliance fr [] Partnership, Joint Venture, C [] PUC for vehicle(s), if applic	om the Hawaii Department of T Corporate Exhibits	
	[] commonto of mapociton for	any ressets used in your commit	ciciai opciation, il 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.
- 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: Adventure Rafting, Inc. 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. <u>Business Practices & Records</u>: 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 Account 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. <u>Time of Payment</u>: 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: <u>Sweet Life</u> Vessel Registration: <u>1152641</u> , Exp	5/31/2022	Vessel Length: 28'
19.	Restrictions:		
	Sites:		
	SEE ATTACHED LIST		
	Activity:		
	SNORKELING		
	WHALE WATCHING		
	CHARTER FISHING		
	•		
	•		
I.	AGREE TO THE TERMS, CONDITIONS ANI	D CHARGES:	
Α	ddress: 102 Haku Pl. Lahaina, HI 96761	Email A	.ddress: <u>captainwoodies@yahoo.com</u>
	Business Phone: (808) 667-2290	Cellular	Phone:
Si	gned by (Authorized Representative)	mh had"	Woodward
Pr	int Name ADVENTURE RAFTING, INC	v	Date Signed: 12/29/2021
•••	Frank Woodward - President		Date Signed: 12/20/2021
		STATE OF HA	
		DIVISION OF	I OF LAND AND NATURAL RESOURCES BOATING AND OCEAN RECREATION
		BY:Daynette	
			A Harbor Agent IV, Lahaina Harbor
		BY: My Signature	MHM. Flores
		Date: 12/29/202	21





675 Wharf Street Lahaina, Hawaii 96791

Rules and Regulations

SUZANNE D. CASE
CILIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
ROBERT K. MASUDA
FIRST DIPHTY DIRECTOR-LAND

M.KALEO MANUEL DEPUTY DIRECTOR - WATER

DEFUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL
ENFORCEMENT
ENFORCEMENT
ENFORCEMENT
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Permit #_CR_20-126744

Mala Commercial Permit #: 01 Account #: 14789

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:

Monthly Payment	\$ 300.00 (f. W
☐ Other	\$ -
∕ d Other ORMA	\$ 300.00
☐ Security Deposit	\$
☐ Gear Locker	\$
☐ Electricity	\$
☐ Mooring	\$ <u>.</u>

- 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 ___01/01/2022 ___(date) and the mooring privilege under this permit terminates on ___03/31/2022 ___(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 t 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.

frak haffir hadrend 12/29/2021
Permittee Signature Date
ADVENTURE RAFTING INC/FRANK WOODWARD
Printed Name of Permittee Permittee Title (PRESIDENT)
Address 102 HAKU PL
City, State, Zip LAHAINA, HI 96761
and/or 808 667 2290
Home Phone Work Phone
Approved by: Department of Land and Natural Resources
Division of Boating and Ocean Recreation
Daynette M Flores
TA Harbor Agent IV, Lahaina Harbor

COMMERCIAL USE QUESTIONNAIRE

	VENTURE KAFT	ING, INC.
Company Representative Nam	Jenture Raft e/Title: Frank (Wood	1) WOODWARD
Complete Address:	02 HAKU PL	
	1E39.7H	
Office #: 808-667		
	n Woodies Q y	Ahoo. Com
whale 1	al activity do you propose to condi	narter Fishing
2 List all locations where you	u are proposing to conduct comme	reial activity, the specific
activity for each location as	u are proposing to conduct commend what equipment you will be uti	lizing.
activity for each location at	Activity	Equipment
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 1 Pursuit,
activity for each location at	Activity Whale Watching,	Equipment 28 1 Pursuit,
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 / Purent, Doc.# 115264
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 / Purent, Doc.# 115264
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 / Purent, Doc.# 115264
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 / Purent, Doc.# 115264
Location Wolft MAN, OCEAN WATER S	Activity Whale Watching,	Equipment 28 / Purent, Doc.# 115264

3.	How do you plan to access the water? (Please indicate for each location whether you are
	accessing through private or public land, state or county, etc.)

<u>m</u>	IALA (- Aunch	RAMP	STATE	oF	HAWAi
<u> </u>						<u></u>
 						
_		access for any of the		which you want	to operate	e require
X	Yes	No				

5. If your answer to question 4 above was "yes", what type of permit/permission do you possess and who is the issuing entity?

Location MALA BOAT RAMP	Landowner Name of Individual or Entity	Type of Permit/Permission Include any Permit #'s if applicable	Telephone Number Best contact for the issuing entity
STATE OF L HAWAII D.LN.R	\rightarrow	MALA RAMY commercial Russi	808-667- + 2290
BOATING DIVISION)	# W- 0T	
	endeligi en		
			12112

4.

6.	Please submit the following documents concurrently with your commercial use permit application for the division's review:				
X J	General Excise Tax License				
M					
[%]	Certificate of Good Standing from Hawaii Department of Commerce and Consumer Affairs (DCCA, BREG), if applicable				
ſΧ	Certificate of Compliance from Hawaii Department of Taxation				
	Letter of Permission from Land Owner for Access to the State Ocean Waters				
[]	Articles of Incorporation or Articles of Organization, if applicable				
[]	PUC for vehicle(s), if applicable				
[X]	Vessel Certificate of Inspection or approved marine survey, if applicable				
[]					
Applic	cant's Signature: Woods f. Woodward Date: 121/20				
Date F Reviet	DOBOR STAFF Reviewed: 12/30/31 wed By: Dayneth M. Flores Dayneth M. Hirrore: The Harbor Agent IV nmendations or Remarks:				
Last Upo	lated 10/23/2020				

EXHIBIT 7 State's Answering Brief Excerpt 2CCV-21-0292

HOLLY T. SHIKIDA 4017 Attorney General of Hawai'i

JULIE H. CHINA 6256
MELISSA D. GOLDMAN 10556
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Department of the Attorney General,
State of Hawai'i
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Honolulu, Hawai'i 96813
Telephone: (808) 587-2980

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Attorneys for Defendants/Appellees BOARD OF LAND AND NATURAL RESOURCES and ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION Electronically Filed SECOND CIRCUIT 2CCV-21-0000292 03-JAN-2022 11:55 PM

Dkt. 98 AB

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

KA MALU O KAHĀLĀWAI, a domestic nonprofit corporation; NA PĀPA'I WAWAE 'ULA'ULA, an unincorporated association; KEKAI KEAHI, individual; and KAI NISHIKI, individual,

Plaintiffs/Appellants,

VS.

BOARD OF LAND AND NATURAL RESOURCES, State of Hawai'i; ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION of Department of Land and Natural Resources, State of Hawai'i; NOIO CHARTERS, INC., a domestic profit corporation; and EXTENDED HORIZONS INC., a domestic profit corporation,

Defendants/Appellees.

Civil No. 2CCV-21-0000292 (3) (Agency Appeal)

DEFENDANTS/ APPELLEES
BOARD OF LAND AND NATURAL
RESOURCES AND
ADMINISTRATOR OF DIVISION
OF BOATING AND OCEAN
RECREATION'S ANSWERING
BRIEF;

CERTIFICATE OF SERVICE

Judge: Hon. Kelsey Kawano

Oral Argument: January 26, 2022

10:00 A.M.

proprietor registered to do business in the state. Notwithstanding this section, all owners of commercial use permits on the effective date of these rules may continue operations and be permitted to apply for and renew their commercial use permits subject to compliance with all other conditions set forth in this chapter until their total number is reduced by attrition or other means to the numbers in subsection (d).

Haw. Admin. R. § 13-231-67 (2014). DLNR's Division of Boating and Ocean Recreation ("**DOBOR**") issues these permits directly to permittees pursuant to HAR § 13-231-67; no separate approval by the Board of Land and Natural Resources ("**BLNR**" or "**Board**") is required.²

The Permits include a list of seventeen terms and conditions, including conditions for the payment of monthly permit-related fees, limitations on the privileges granted, and the following language regarding termination/revocation of the Permits:

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 [DLNR], if the activity or offense is not corrected following seventy-two (72) hours notice by the [DLNR] 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.

See, e.g., JEFS Dkt. 082 at R00036. Under their terms and conditions, the Permits also clearly state that the DLNR "reserves the right to impose further restrictions" thereon. See, e.g., JEFS Dkt. 082 at R00037. Additionally, the DLNR specifically authorizes named permittees "to conduct the describe[d] 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-

3

The permit renewals at issue in this administrative appeal challenge two of the fifteen total allowed Permits at Mala Boat Ramp. Significantly, Petitioners do not challenge the fifteen-permit cap set forth in HAR § 13-231-67.

EXHIBIT 8 State's Joinder Excerpt 2CCV-21-0292

HOLLY T. SHIKIDA 4017 Attorney General of Hawai'i

JULIE H. CHINA 6256
MELISSA D. GOLDMAN 10556
Deputy Attorneys General
Department of the Attorney General,
State of Hawai'i
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Telephone: (808) 587-2980

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Attorneys for Defendants/Appellees BOARD OF LAND AND NATURAL RESOURCES and ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION Electronically Filed SECOND CIRCUIT 2CCV-21-0000292 07-JAN-2022 01:54 PM Dkt. 105 JOIN

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

KA MALU O KAHĀLĀWAI, a domestic nonprofit corporation; NA PĀPA'I WAWAE 'ULA'ULA, an unincorporated association; KEKAI KEAHI, individual; and KAI NISHIKI, individual,

Plaintiffs/Appellants,

VS.

BOARD OF LAND AND NATURAL RESOURCES, State of Hawai'i; ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION of Department of Land and Natural Resources, State of Hawai'i; NOIO CHARTERS, INC., a domestic profit corporation; and EXTENDED HORIZONS INC., a domestic profit corporation,

Defendants/Appellees.

Civil No. 2CCV-21-0000292 (3) (Agency Appeal)

DEFENDANTS/ APPELLEES
BOARD OF LAND AND
NATURAL RESOURCES AND
ADMINISTRATOR OF DIVISION
OF BOATING AND OCEAN
RECREATION'S **JOINDER TO**[094] DEFENDANTS-APPELLANTS
NOIO CHARTERS, INC. AND
EXTENDED HORIZONS, INC.'S
MOTION TO DISMISS FILED
JANUARY 3, 2022

CERTIFICATE OF SERVICE

Hearing

Judge: Hon. Kelsey Kawano Date: January 26, 2022 Time: 10:00 A.M.

DEFENDANTS/ APPELLEES BOARD OF LAND AND NATURAL RESOURCES AND ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION'S JOINDER TO [094] DEFENDANTS-APPELLANTS NOIO CHARTERS, INC. AND EXTENDED HORIZONS, INC.'S MOTION TO DISMISS FILED JANUARY 3, 2022

Defendants/Appellees Board of Land and Natural Resources ("Board") and the Administrator of the Division of Boating and Ocean Recreation (collectively, "State Defendants") hereby join substantively in Defendants-Appellees Noio Charters, Inc. and Extended Horizons Inc.'s (collectively, "Permittee Defendants") Motion to Dismiss filed January 3, 2022 ("Motion to Dismiss"; JEFS Dkt. 094). The State Defendants join and incorporate arguments made in the Motion to Dismiss.

The Board of Land and Natural Resources ("Board") denied a petition for a contested case hearing filed July 28, 2021 ("Petition"; JEFS Dkt. 032) regarding the renewal/reissuance of commercial ramp permits for non-exclusive use of Mala Boat Ramp by Permittee Defendants pursuant to Hawaii Administrative Rules ("HAR") § 13-231-67. The Permits identified in the July 28, 2021 Petition "for Extended Horizons Inc. and Noio Charters, Inc." at the time the Petition was filed were each set to expire on August 31, 2021. *See* JEFS Dkts. 084 at R00065 (Permit No. 20-34567), 086 at R00089 (Permit No. 20-40755). Ordinarily, the Department of Land and Natural Resources' ("DLNR's") Division of Boating and Ocean Recreation ("DOBOR") issues these permits directly to permittees pursuant to HAR § 13-231-67. No separate Board approval is required. For procedural reasons outside of DOBOR's control, it was not possible to place the July 28, 2021 Petitions on the Board's meeting agenda prior to

_

The permit renewals at issue in this administrative appeal challenge two of the fifteen total allowed Permits at Mala Boat Ramp. Significantly, Plaintiffs/Appellants Na Pāpa'i Wawae 'Ula'ula, Ka Malu O Kahālāwai, Kekai Keahi and Kai Nishiki's (collectively, "Petitioners") do not challenge the fifteen-permit cap set forth in HAR § 13-231-67.

August 31, 2021.² DOBOR therefore renewed each of the Permittee Defendants' permits "for a period of three months to allow for the Board to review and decide" the Petitions. JEFS Dkt. 041 at R00118; see also JEFS Dkts. 081 at R00014 (Permit No. 20-104046), 082 at R00038 (Permit No. 20-92982). The Permits which are the subject of this appeal—the temporary, three-month permits expiring December 31, 2021—have already expired by their own terms.³

Thus, if the Motion to Dismiss is granted on mootness grounds as to the Permittee Defendants, then it logically follows that the State Defendants are entitled to prevail on the same basis. See Bremmer v. Honolulu, 96 Hawai'i 134, 143-44, 28 P.3d 350 (2001).

DATED: Honolulu, Hawai'i, January 7, 2022.

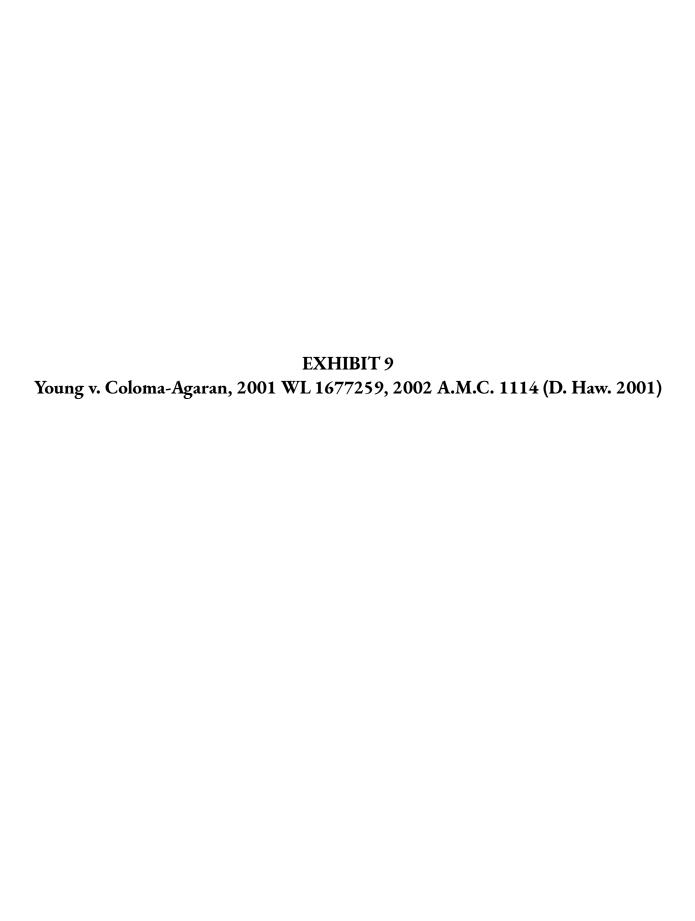
/s/ Melissa D. Goldman JULIE H. CHINA MELISSA D. GOLDMAN Deputy Attorneys General

Attorneys for Defendants/Appellees BOARD OF LAND AND NATURAL RESOURCES and ADMINISTRATOR OF DIVISION OF BOATING AND OCEAN RECREATION

Section 13-1-5(b), HAR, which sets forth the Board's regular meeting requirement also

requires advance notice "in a newspaper of general circulation" if there are any proposed changes to the scheduled meetings. The Board's schedule of regular 2021 meetings is available at, https://dlnr.hawaii.gov/meetings/blnr-meetings-2021/.

Additional permits were issued after the Board's October 8, 2021 denial of the Petition, and Plaintiffs/Appellants Na Pāpa'i Wawae 'Ula'ula, Ka Malu O Kahālāwai, Kekai Keahi and Kai Nishiki's (collectively, "Petitioners") have also filed an administrative appeal challenging those with this Court, Civil No. 2CCV-22-00000002 [hereinafter Mala3]. Petitioners have filed a Motion for Consolidation of the instant administrative appeal [hereinafter *Mala1*] with *Mala3*. See Mot. for Consolidation, JEFS Dkts. 100 & 102 (errata correcting title of motion). If the Motion to Dismiss is granted in *Mala1*, then Consolidation with *Mala3* should be denied.



2001 WL 1677259 United States District Court, D. Hawai'i.

Ralph A. YOUNG, d.b.a. Hanalei Sport Fishing & Tours, Whitey's Boat Cruises, Inc., a Hawaii corporation, d.b.a. Na Pali Catamarans, and Robert F. Butler, Jr., d.b.a. Capt. Sundown Enterprises, Plaintiffs,

v.

Gilbert COLOMA–AGARAN, in his capacity as Chairperson, Department of Land and Natural Resources, State of Hawaii; Mason Young, in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaiʻi; and Vaughan E. Tyndzik, in his capacity as Kauaʻi District Manager, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaiʻi, Defendants.

No. CIV.00-00774HG-BMK.

Dec. 27, 2001.

Synopsis

Tour boat operators brought action challenging constitutionality of ban prohibiting them from operating their vessels in a particular bay. Upon cross-motions for summary judgment, the District Court, Gillmor, J., held that: (1) ban was unconstitutional under the doctrine of conflict preemption since ban prohibited plaintiffs from engaging in commerce expressly authorized by their federal licenses, and (2) ban violated Commerce Clause since purported reasons for the ban were unsubstantiated and were inadequate to outweigh the grave burdens on tour boat operations affecting interstate commerce.

Plaintiffs' motion granted.

West Headnotes (15)

Collapse West Headnotes

Change View

1



Supremacy Clause is the basis of the doctrine of federal preemption. U.S.C.A. Const. Art. 6, cl. 2.



Federal preemption occurs where: (1) federal statutes or regulations include language explicitly preempting state action in a given area; (2) the intent of Congress is clearly manifested, implicit from a pervasive scheme of federal regulation, or implicit from the fact that the federal law touches a field in which the federal interest is so dominant; or (3) actual conflict exists between state and federal law. U.S.C.A. Const. Art. 6, cl. 2.

3



Federal regulations, as well as federal statutes, may preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

4



"Conflict preemption" occurs when compliance with both state and federal law is impossible, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

5





State regulation prohibiting commercial tour boat operators from operating their vessels in a particular bay was unconstitutional under the doctrine of conflict preemption since ban prohibited them from engaging in commerce expressly authorized by their federal licenses. U.S.C.A. Const. Art. 6, cl. 2.

1 Case that cites this headnote

6



A state may not completely exclude a federally licensed vessel from its navigable waters.

7





A state may not exclude from its waters a ship operating under a federal license; exclusion need not be from all navigable waters of a state to violate the Supremacy Clause, rather, exclusion from particular waters suffices. U.S.C.A. Const. Art. 6, cl. 2.



An evenhanded state law aimed at effectuating a legitimate local public interest may escape the reach of the Supremacy Clause, despite an actual conflict between the federal and state laws. U.S.C.A. Const. Art. 6, cl. 2.

9



A state statute triggers scrutiny under the commerce clause when: (1) the statute affirmatively discriminates, either on its face or in practical effect, against transactions in interstate commerce, or (2) the statute regulates evenhandedly but incidentally burdens interstate transactions. U.S.C.A. Const. Art. 1, § 8, cl. 3.

10



Protections of the Commerce Clause apply to activities of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

11

Commerce Regulation and conduct in general; particular businesses

A measure is discriminatory, for purposes of Commerce Clause analysis, if it involves differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. U.S.C.A. Const. Art. 1, § 8, cl. 3.

12

Commerce Local matters affecting commerce

For purposes of Commerce Clause analysis, if a state regulation is discriminatory, the burden is on the State to demonstrate that the statute serves a legitimate local purpose that could not be served as well by available nondiscriminatory means. U.S.C.A. Const. Art. 1, § 8, cl. 3.

13

Commerce Regulation and conduct in general; particular businesses

A statute is not discriminatory for Commerce Clause purposes if it only happens to burden some interstate companies. U.S.C.A. Const.Art. 1, § 8, cl. 3.

14

Commerce Navigation, shipping, and related matters

State regulation prohibiting commercial tour boat operators from operating their vessels in a particular bay violated Commerce Clause; although fact that the ban affected non-residents more substantially than residents did not establish that the ban was affirmatively discriminatory and ban language did not affirmatively discriminate between intrastate and interstate commerce, the purported reasons for the ban were unsubstantiated and were inadequate to outweigh the grave burdens on tour boat operations affecting interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.



A statute that has only indirect effects on interstate commerce and regulates evenhandedly may violate the Commerce Clause if its burden on interstate commerce is clearly excessive in relation to the local benefits. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Attorneys and Law Firms

Dennis Niles, Dangkhoa T. Nguyen, Paul Johnson Park & Niles, Wailuku, HI, for Ralph A. Young and Whitey's Boat Cruises, Inc.

Jack F. Schweigert, Honolulu, HI, for Robert F. Butler, Jr.

Yvonne Y. Izu, Office of Attorney General-State of Hawaii, Honolulu, HI, for Timothy E. Johns.

Dawn Shigezawa, Yvonne Y. Izu, Office of Attorney General–State of Hawaii, Honolulu, HI, for Howard B. Gehring, Vaughan E. Tyndzik and Gilbert S. Coloma–Agaran.

Yvonne Y. Izu, Office of Attorney General-State of Hawaii, Honolulu, HI, for David E. Parsons.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; ISSUING A PERMANENT INJUNCTION; AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

GILLMOR, District Judge.

*1 Plaintiffs are commercial tour boat operators on the northern coast of Kauai. Pursuant to Hawaii Administrative Rules § 13–256–36 ("Ban"), Plaintiffs have been banned from operating their vessels in Hanalei Bay. Plaintiffs have brought suit against State of Hawai'i officials, alleging that the state Ban violates their rights under the Procedural Due Process Clause, Substantive Due Process Clause, Supremacy Clause, Equal Protection Clause, and Commerce Clause of the United States Constitution.

Before the Court are cross-motions for summary judgment.

Plaintiffs request a declaratory judgment with respect to their theories of relief under the Substantive Due Process Clause, Supremacy Clause, and Equal Protection Clause of the United States Constitution. Plaintiffs also request an injunction enjoining Defendants from prohibiting Plaintiffs from conducting their commercial operations in Hanalei Bay.

Defendants filed a cross-motion for summary judgment on the same theories of relief on which Plaintiffs move for summary judgment and, in addition, on Plaintiffs' Commerce Clause theory of relief.

Plaintiffs' Procedural Due Process theory of relief was dismissed on summary judgment on February 23, 2001 because evidence of violations of state rulemaking procedures did not rise to the level of federal due process violations. The Court's decision was affirmed on appeal on June 14, 2001.

The Court finds the state Ban, as applied to Plaintiffs, violates the Supremacy Clause and Commerce Clause of the United States Constitution. Plaintiffs' Motion for Summary Judgment is GRANTED in part as to the Supremacy Clause and Commerce Clause theories of relief; Defendants' Motion for Summary Judgment is DENIED in part as to the Supremacy Clause and Commerce Clause theories of relief. Based on the violations of the Supremacy Clause and the Commerce Clause of the United States Constitution, the Court orders a permanent injunction in favor of Plaintiffs as described in the Minute Order of August 16, 2001. The Court does not reach Plaintiffs' Equal Protection Clause and Substantive Due Process Clause theories of relief. The case is DISMISSED.

BACKGROUND

Plaintiffs are commercial tour boat operators on the northern coast of Kauai. Since 1993 or 1994, each has been licensed by the Department of Land and Natural Resources, State of Hawaii, to operate his tour boat in Hanalei Bay. Most recently, in February of 2000, Plaintiffs were granted permits to conduct passenger charter boat services in Hanalei Bay. Plaintiffs also hold United States Department of Transportation, United States Coast Guard, Certificates of Documentation for coastwise endorsement ("federal licenses"). The federal licenses authorize Plaintiffs to engage in commerce in the navigable waters of Kauai, which include Hanalei Bay. (Gehring Dep. at 11–12, DN–12, attached to Pls. Mot. filed Jan. 5, 2001; United States Coast Pilot, DN–32, attached to Pls. Mot. filed June 21, 2001 (hereinafter "Pls. Sec. Mot.").)

*2 For years Plaintiffs were allowed to operate their vessels commercially in Hanalei Bay. Plaintiffs Young and Whitey operate virtually identical gasoline-powered catamarans, the engines of which meet the pollutant discharge standards of the United States Environmental Protection Agency. (Grigg Decl. ¶ 9, attached to Pls. Sec. Mot.) Plaintiff Butler operates a wind-powered catamaran. (*Id.* ¶ 9.) Plaintiffs' tours take passengers across Hanalei Bay to the Na Pali coastline of Kauai's north shore. The most recent permits issued to Plaintiffs restrict the number of operations to two to three per day except for Sundays and state holidays, limit the number of passengers to fifteen, prohibit the vessels from navigating within 500–feet of the shoreline at Hanalei except within designated ingress and egress corridors, and set a speed limit of five miles per hour while in certain areas. (Young Decl. ¶¶ 14, 16; Exs. RY–7, RY–9, attached to Pls. Sec. Mot.; Hawaii Administrative Rules (HAR) § 13–256–39 (1994).)

On November 20, 2000, Defendants promulgated Hawaii Administrative Rule § 13-256-36 ("the Ban"). The Ban states in relevant part:

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 and Hanalei Bay ocean waters.

On December 1, 2000, just after the Ban took effect on November 30, 2000, Plaintiffs Ralph A. Young, d.b.a. Hanalei Sport Fishing & Tours ("Young"), Whitey's Boat Cruises, Inc., d.b.a. Na Pali Catamarans ("Whitey's"), and Robert F. Butler, Jr., d.b.a. Capt. Sundown Enterprises ("Butler") (collectively "Plaintiffs") filed a Complaint for Declaratory Judgment and Injunctive Relief against the Chairperson of the Department of Land and Natural Resources, State of Hawaii; the Acting Administrator of the Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii; and the Kauai District Manager of the Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii; challenging the Ban on federal constitutional grounds. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, persons named as Defendants in the Complaint have been changed to reflect any successors in the offices of the original Defendants.

On December 7, 2000, Plaintiffs filed Plaintiffs' Motion for Temporary Restraining Order, based on Plaintiffs' Procedural Due Process theory of relief, which was granted on December 19, 2000.

On January 5, 2001, Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, Preliminary Injunction, based on the Procedural Due Process Clause theory of relief, was filed. After a hearing, the motion was denied on February 23, 2001.

When Plaintiffs' permits expired in February 2001, Plaintiffs were not allowed to renew their permits due to the newly enacted Ban.

*3 On March 2, 2001, Plaintiffs filed a Notice of Appeal from the denial of their January 5, 2001 motion requesting partial summary judgment and/or preliminary injunction on their Procedural Due Process theory of relief.

On March 20, 2001, Plaintiffs filed a First Amended Complaint for Declaratory Judgment and Corresponding Injunctive Relief. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, persons named as Defendants in the First Amended Complaint have been changed to reflect any successors in office.

On June 14, 2001, the Ninth Circuit affirmed the February 23, 2001 order of this Court denying Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, Preliminary Injunction.

On June 21, 2001, Plaintiffs' Motion for Temporary Restraining Order, and Plaintiffs' Motion for Summary Judgment on Third and Fifth Claims or, in the Alternative, for Preliminary Injunctive [sic] ("Plaintiffs' Motion"), were filed. Plaintiffs' Motion for Temporary Restraining Order relied on Plaintiffs' Motion for summary judgment, which challenges the Ban based on the Substantive Due Process Clause, Supremacy Clause, and Equal Protection Clause of the United States Constitution. Also on June 21, 2001, Plaintiffs' Separate and Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment on Third and Fifth Claims or, in the Alternative, for [sic], and a Supplemental Declaration of Ralph A. Young, were filed.

On June 25, 2001, Defendants Gilbert Coloma–Agaran, Howard B. Gehring, and Vaughan E. Tyndzik's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order Filed on June 21, 2001, was filed.

Plaintiff's Motion for Temporary Restraining Order came before the Court for hearing on June 27, 2001, and was granted. At the hearing, the parties stipulated that the temporary restraining order would remain in effect until the hearing on the cross-motions for summary judgment scheduled for August 6, 2001.

On June 29, 2001, a Temporary Restraining Order was issued.

On June 29, 2001, "Defendants Gilbert S. Coloma–Agaran, Howard B. Gehring, Vaughan E. Tyndzik's Motion for Summary Judgment ("Defendants' Motion"); Memorandum (1) in Support of Defendants' Motion for Summary Judgment, and (2) in Opposition to Plaintiffs' Motion for Summary Judgment on Third and Fifth Claims or, in the Alternative, for Preliminary Injunction Filed on June 21, 2001," was filed. Defendants' Motion requests dismissal of all of Plaintiffs' remaining theories of relief.

On June 29, 2001, Defendant Gilbert S. Coloma–Agaran, Howard B. Gehring, Vaughan E. Tyndzik's Separate and Concise Statement of Facts in Opposition to Plaintiffs' Motion for Summary Judgment on the Third and Fifth Claims or, in the Alternative, for Preliminary Injunction and in Support of Defendants' Motion for Summary Judgment was filed.

On July 19, 2001, "Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment," and "Plaintiffs' Separate and Concise Statement of Facts in [Opposition] to Defendants' Separate Concise Statement of Facts in Support of Defendants' Motion for Summary Judgment Filed on June 29, 2001," were filed.

*4 The parties' cross-motions for summary judgment came before the Court for hearing on August 6, 2001. At the hearing, the Court extended the temporary restraining order for ten days until August 16, 2001.

On August 16, 2001, the Court issued a Minute Order granting a permanent injunction in favor of the Plaintiffs.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment without significant probative evidence tending to support its legal theory. *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir.1979). A court must view the facts in the light most favorable to the non-moving party. *State Farm Fire & Casualty Co. v. Martin,* 872 F.2d 319, 320 (9th Cir.1989). The non-moving party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. *T.W. Elec. Serv.,* 809 F.2d at 630; Fed.R.Civ.P. 56(e).

ANALYSIS

In the First Amended Complaint, Plaintiffs allege that § 13–256–36 of the Hawaii Administrative Rules ("Ban") violates their rights under five provisions of the United States Constitution:

- 1. Procedural Due Process Clause (Count 1)
- 2. Substantive Due Process Clause (Count 2)
- 3. Equal Protection Clause (Count 3)
- 4. Commerce Clause (Count 4)
- 5. Supremacy Clause (Count 5)

Plaintiffs' Procedural Due Process theory of relief (Count 1) was dismissed on summary judgment on February 23, 2001 after the Court determined that evidence of violations of state rulemaking procedures relating to the enactment of the Ban did not rise to the level of federal due process violations. Plaintiffs and Defendants move for summary judgment on the Substantive Due Process Clause (Count 2), the Equal Protection Clause (Count 3), and the Supremacy Clause (Count 5) theories of relief. Defendants also move for summary judgment on Plaintiffs' Commerce Clause theory of relief (Count 4).

I. Supremacy Clause Claim ("Fifth Claim for Relief: Unconstitutional Restrictions on Federal Vessels")

- 1The Supremacy Clause is located in Article VI, clause 2 of the United States Constitution, and provides that the laws of the United States "shall be the supreme Law of the Land." The Supremacy Clause is the basis of the doctrine of federal preemption. *International Ass'n of Indep. Tanker Owners (INTERTANKO) v. Locke*, 148 F.3d 1053, 1058–59 (9th Cir.1998), *aff'd in part United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).
- *5 2Federal preemption occurs where: (1) federal statutes or regulations include language explicitly preempting state action in a given area ("explicit preemption"); (2) the intent of Congress is clearly manifested, implicit from a pervasive scheme of federal regulation, or implicit from the fact that the federal law touches a field in which the federal interest is so dominant ("implicit preemption"); or (3) actual conflict exists between state and federal law ("conflict preemption"). Barber v. Hawaii, 42 F.3d 1185, 1189 (9th Cir.1994).

3Federal regulations, as well as federal statutes, may preempt state law. *Locke*, 529 U.S. at 109–10, 120 S.Ct. 1135; see also de la Cuesta, 458 U.S. at 153, 102 S.Ct. 3014 ("Federal regulations have no less preemptive effect than federal statutes").

At least one court has noted that the standard under the Supremacy Clause is more favorable to plaintiffs than the more closely related rational basis standards under the Equal Protection Clause, Substantive Due Process Clause, and Commerce Clause of the United States Constitution. *Nat'l Helicopter Corp. of Am. v. City of New York,* 1999 WL 562031, *5 (S.D.N.Y. July 30, 1999) (quotation marks and citation omitted); *Burlington N. R.R. Co. v. Dept. of Pub. Serv. Reg.,* 763 F.2d 1106, 1109 (9th Cir.1985).

The Supremacy Clause analysis focuses on the existence of a conflict between federal and state law, whereas the rational relationship analyses of the Equal Protection Clause, Substantive Due Process Clause, and Commerce Clause generally provide for deference to the local government and require only a rational reason to justify a state law.

Here, the Ban is unconstitutional under the doctrine of conflict preemption pursuant to the Supremacy Clause of the United States Constitution.

A. Conflict Preemption

4Conflict preemption occurs when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); see also California v. ARC Am. Corp., 490 U.S. 93, 100–01, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989); *Locke,* 529 U.S. at 109, 120 S.Ct. 1135. The existence of conflict preemption depends, in part, on the nature and bounds of the state and federal laws. "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell,* 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

5Here, the Ban prohibits Plaintiffs from engaging in commerce expressly authorized by their federal licenses.

B. Plaintiffs' Federal Licenses

Plaintiffs hold United States Department of Transportation, United States Coast Guard, Certificates of Documentation for coastwise endorsement ("federal licenses"). (Exs. RY–10, DN–27, DN–29, attached to Pls. Sec. Mot.) A relevant federal regulation states: "A coastwise endorsement entitles a vessel to employment in unrestricted coastwise trade, dredging, towing, and any other employment for which a registry, fishery, or Great Lakes endorsement is not required." 46 C.F.R. § 67.19 (emphasis added). The federal licenses allow Plaintiffs to operate their vessels in the "Pacific Ocean Area, Island of Kauai, State of Hawaii, not more than 20 miles from harbor or safe refuge." The navigable waters of Kauai include Hanalei Bay. (Gehring Dep. of Dec. 28, 2000 at 11–12, DN–12, attached to Pls. Mot. filed Jan. 5, 2001; United States Coast Pilot, DN–32, attached to Pls. Sec. Mot.)

*6 In *Gibbons v. Ogden*, the United States Supreme Court decided that the statutory phrase "coasting trade" in a federal license encompassed both the carriage of passengers for hire as well as the transport of goods. 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824) (cited in *Douglas v. Seacoast Prod., Inc.,* 431 U.S. 265, 276, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977)). The license does not merely establish the nationality of the vessels but "implies, unequivocally, an authority to licensed vessels to carry on" the activity for which they are licensed. *Gibbons*, 22 U.S. (9 Wheat.) at 212, (cited in *Douglas*, 431 U.S. 265, 97 S.Ct. 1740).

Pursuant to federal law, Plaintiffs' federal licenses authorize Plaintiffs to engage in commerce in Hanalei Bay.

C. Hawaii Law

The Ban prohibits Plaintiffs from conducting their commercial operations in Hanalei Bay. The Ban provides in relevant part:

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 and Hanalei Bay ocean waters.

H.A.R. § 13–256–36. According to its plain language, the Ban prohibits all commercial activity in Hanalei Bay or Hanalei River, except for two kayaking operations. *Id.*

Pursuant to Hawaii Revised Statutes § 200–6, however, the Ban does not apply to "[v]essels engaged in interstate or foreign commerce" or "[p]leasure craft or fishing vessels temporarily anchored for a period of less than seventy-two hours." Haw.Rev.Stat. § 200–6(b).

Combined with Hawaii Revised Statutes § 200–6, the Ban does not prohibit the commercial operation in Hanalei Bay of two kayak operations, vessels engaged in interstate or foreign commerce, or temporarily anchored pleasure craft or fishing vessels. The Ban has been applied, however, to prohibit Plaintiffs' commercial operations in Hanalei Bay.

Defendants' pleadings do not reference or take into account the effect of Section 200–6 of the Hawaii Revised Statutes on the Ban. Defendants' pleadings, therefore, are premised on an inaccurate depiction of the effect of the Ban. Defendants state in their Opposition, for example; "There is no distinction between commercial *passenger* uses versus other uses. Except for two kayak operations, subsection (2) of HAR 13–256–36 bans *all* commercial uses in Hanalei River and the Hanalei Bay ocean waters." (Defs. Opp. at 8 (emphasis added).) This is incorrect for two reasons.

First, the allegation that the Ban does not distinguish between commercial passenger uses and other uses is erroneous. At the hearing, Defendants conceded that although commercial fishing vessels are excepted from the Ban pursuant to Section 200–6 of the Hawaii Revised

Statutes, commercial fishing vessels *that carry paying passengers* are prohibited from operating in Hanalei Bay pursuant to the Ban. (Tr. of hearing on Aug. 6, 2001 at 19.) This distinction clearly distinguishes between passenger-carrying and non-passenger carrying fishing vessels.

*7 Second, the allegation that the Ban prohibits all commercial uses in Hanalei Bay except for the two kayak operations is also erroneous. Section 200–6 of the Hawaii Revised Statutes excepts commercial vessels other than two kayak operations from the Ban. For example, at the hearing before the Court, Defendants conceded that commercial *fishing* vessels are excepted from the Ban. (Tr. at 28.) Plaintiffs have also presented the Declaration of Plaintiff Young to show that both commercial and recreational fishing boats are allowed to operate in Hanalei Bay. (Young Supp. Decl. ¶ 6; Young Decl. ¶ 7, EG–1, attached to Pls. Mot.) At the hearing, Plaintiffs also asserted that large cruise ships are also excepted from the Ban. (Tr. at 19–20.) Commercial boats other than two kayak operations are allowed to operate in Hanalei Bay.

The parties have not argued, and the Court does not address, the possibility of Plaintiffs' tourism-centered commercial businesses being excepted from the Ban pursuant to Section 200–6 allowing "[v]essels engaged in interstate or foreign commerce" to utilize Hanalei Bay. Haw.Rev.Stat. § 200–6.

D. States May Not Completely Exclude Federally Licensed Commerce

6Caselaw is clear that a state may not completely exclude a federally licensed vessel from its navigable waters.

7"The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 447, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); see *also Douglas*, 431 U.S. at 288, 97 S.Ct. 1740 (quoting *Florida Lime and Avocado Growers, Inc.*, 373 U.S. at 142, 83 S.Ct. 1210 ("no State may completely exclude federally licensed commerce")). "That no State may completely exclude federally licensed commerce is indisputable." *Florida Lime*, 373 U.S. at 142, 83 S.Ct. 1210.

1. Exclusion From Only One Body of Water

Complete exclusion does not require exclusion from all navigable waters of a state. Whether Plaintiffs are allowed to conduct commerce in other waters of Kauai or the State of Hawaii does not rectify the Supremacy Clause violation in prohibiting Plaintiffs from operating their federally licensed vessels in Hanalei Bay.

In *Huron,* the Court distinguished its case from one in which a local regulation so burdens the federal license as to be constitutionally invalid: "The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage." 362 U.S. at 448, 80 S.Ct. 813 (upholding a Detroit smoke abatement ordinance requiring "no more than compliance with an orderly and reasonable scheme of community regulation"). In so distinguishing, the court indicated that the exclusion of a federally licensed vessel from the Port of Detroit, if the situation were to arise, would be unconstitutional.

In *Waste Mgmt. Holdings, Inc. v. Gilmore,* a state statute completely excluded barges that were federally licensed to engage in coastwise trade, from transporting any type or amount of solid waste on three rivers in Virginia. 252 F.3d 316, 323 (4th Cir.2001). The Fourth Circuit held that the state statute was unconstitutional under the Supremacy Clause. *Id.* at 348. The fact that the barges were not completely excluded from all the waters in Virginia did not save the state statute from being declared violative of the Supremacy Clause.

*8 Exclusion need not be from all navigable waters of a state to violate the Supremacy Clause. Exclusion from particular waters suffices.

2. Ban Completely Excludes Plaintiffs' Federally Licensed Commerce

Here, the Ban prohibits Plaintiffs from operating their vessels for commercial purposes in Hanalei Bay. As such, the Ban completely excludes Plaintiffs' federally licensed commerce from Hanalei Bay. The Ban is similar to the hypothetical posed in *Huron*, in which excluding a federally licensed vessel from the Port of Detroit was given as an example of a violation of the Supremacy Clause, and the state statute in *Waste Mgmt. Holdings, Inc.*, banning certain commercial activity in three rivers in Virginia. The Ban violates the Supremacy Clause because it completely excludes federally licensed commerce from Hanalei Bay.

E. Legitimate and Evenhanded Local Regulations Are Permissible

8An evenhanded state law aimed at effectuating a legitimate local public interest may escape the reach of the Supremacy Clause, despite an actual conflict between the federal and state laws. *Douglas*, 431 U.S. at 277, 286, 97 S.Ct. 1740. For example, in *Douglas*, the United States Supreme Court stated: "States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." *Id.* at 277, 97 S.Ct. 1740.

The principle that legitimate, even-handed local regulations are permissible, however, does not trump, but must give way to, the principle that a state may not completely exclude federally licensed commerce from its waters.

In *Florida Lime*, the Court held that a state statute establishing stricter requirements for the selling of avocados than a federal statute did not violate the Supremacy Clause. 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). The Court distinguished its facts from cases in which a state law completely bans a product that meets federal requirements: "That no State may completely exclude federally licensed commerce is indisputable, but that principle has no application to this case." *Id.* at 142, 83 S.Ct. 1210. *Locke*, 529 U.S. at 90–91, 120 S.Ct. 1135 (upholding local prohibitions on access to a navigable waterway based on "the peculiarities of the local waters that call for special precautionary measures ... such as water depth and narrowness, idiosyncratic to a particular area"). In *Waste Mgmt. Holdings*, in discussing the analysis for legitimate even-handed regulations, the United States Supreme Court stated: "Precedent is clear, however, that a state statute that completely excludes federally licensed commerce upon such state's waterways is unconstitutional." *Waste Management Holdings*, 252 F.3d at 348 (citing *Douglas*, 431 U.S. at 283, 97 S.Ct. 1740). The United States Supreme Court has recognized that the principle allowing legitimate and even-handed regulations does not apply where a state law completely excludes federally licensed commerce.

F. Ban Violates the Doctrine of Actual Conflict Preemption

*9 In essence, the Ban completely prohibits federally licensed commerce in Hanalei Bay. The Ban prohibits Plaintiffs' federally licensed vessels from engaging in commerce in Hanalei Bay irrespective of the vessels' ability to comply with reasonable, non-discriminatory regulations. The Ban violates the Supremacy Clause and is preempted by Plaintiffs' federal licenses under federal law.³

II. Commerce Clause ("Fourth Claim for Relief: Violation of Commerce Clause")

The Commerce Clause is located in Article I, Section 8, Clause 3 of the United States Constitution, and states: "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause has been interpreted "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (footnote omitted).

9Generally, Commerce Clause analysis focuses on distinguishing between two categories of state statutes. "A state statute triggers scrutiny under the commerce clause in either of two situations: (1) when the statute 'affirmatively discriminates,' either on its face or in practical effect, against transactions in interstate commerce, or (2) when the statute regulates evenhandedly but incidentally burdens interstate transactions." Hass v. Oregon State Bar, 883 F.2d 1453, 1462 (9th Cir.1989) (quoting Maine v. Taylor, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)).

The United States Supreme Court has recognized that the two situations sit on a spectrum rather than on opposite sides of a dividing line. "[B]etween these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." Southern Pac. Co. v. State of Arizona, 325 U.S. 761, 768–69, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (citations omitted); see also Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The crucial inquiry is whether a statute is basically a discriminatory, protectionist measure that is per se invalid, or whether the state law can fairly be viewed as directed toward legitimate, local concerns with effects upon interstate commerce that are only incidental. City of Phila. v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." Brown–Forman, 476 U.S. at 579, 106 S.Ct. 2080.

A. Interstate Commerce Requirement

10The protections of the Commerce Clause apply to activities of interstate commerce. Plaintiffs' commercial operations constitute interstate commerce because they cater to tourists from out-of-state. The United States Supreme Court has held that an operator of a church camp serving mostly non-residents is engaged in interstate commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 573, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997). The Seventh Circuit has held that a "bingo hall and casino designed to attract tourists from surrounding states undeniably affects interstate commerce for Commerce Clause purposes." *United States v. Funmaker,* 10 F.3d 1327, 1331 (7th Cir.1993). "Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Camps Newfound,* 520 U.S. at 573–74, 117 S.Ct. 1590 (quotation marks and citations omitted). Plaintiffs' commercial operations in Hanalei Bay are tied to interstate commerce.

B. The Ban Does Not Affirmatively Discriminate Against Interstate Commerce

*10 1112To determine whether a law violates the Commerce Clause, a court must determine if the law affirmatively discriminates against transactions in interstate commerce, either on its face or in its practical effect. *Hass*, 883 F.2d at 1462 (citing *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)). A measure is discriminatory if it involves "differential treatment of in-state and out-of-state

economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of State of Or.,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (internal quotation marks and citations omitted). If the rule affirmatively discriminates, it is virtually per se invalid. *Id.* If a state regulation is discriminatory, the burden is on the State to demonstrate that the statute serves a legitimate local purpose that could not be served as well by available nondiscriminatory means. *Hass,* 883 F.2d at 1462 (citing *Maine v. Taylor,* 477 U.S. at 138, 106 S.Ct. 2440) (quotation marks and additional citation omitted).

13An example of a discriminatory state law is one that singles out institutions that serve mostly state residents for beneficial tax treatment, while penalizing those institutions that serve principally non-residents. See, e.g., Camps Newfound/Owatonna, Inc., 520 U.S. 564, 117 S.Ct. 1590, 137 L.Ed.2d 852. A statute is not discriminatory, however, if it only happens to burden some interstate companies. See, e.g., CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (as nothing in the state statute imposes a greater burden on out-of-state offerors than in-state offerors, the statute is non-discriminatory).

14Here, Plaintiffs concede that the Ban does not affirmatively discriminate against interstate commerce, stating: "Plaintiffs do not contend that the ban affirmatively discriminates against interstate commerce, but rather that it constitutes a burden on maritime commerce." (Pls. Opp. at 12.) The Ban states that "[n]o 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," without regard to whether the vessels are from Hawai'i or another state, and whether the passengers are residents or non-residents of Hawaii. The fact that the Ban affects non-residents more substantially does not establish that the Ban is affirmatively discriminatory. For purposes of the Commerce Clause analysis, the Ban language does not affirmatively discriminate between intrastate and interstate commerce. CTS Corp., 481 U.S. at 88, 107 S.Ct. 1637.

C. The Ban Has a Substantial Effect on Interstate Commerce

15A statute that has only indirect effects on interstate commerce and regulates evenhandedly may violate the Commerce Clause if its burden on interstate commerce is clearly excessive in relation to the local benefits. *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 399 (9th Cir.1995); *Clover Leaf*, 449 U.S. at 472, 101 S.Ct. 715 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)). "Whether the burden is clearly excessive depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Hass*, 883 F.2d at 1462 (internal quotations omitted); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted); *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250, 1256 (9th Cir.1983). The burden is on the party challenging the statute to establish that the burden on interstate commerce is clearly excessive. *Hass*, 883 F.2d at 1462.

1. Substantial Effect on Interstate Commerce

*11 Here, the Ban does not discriminate between interstate and intrastate commerce, but it does have a substantial effect on interstate commerce

Plaintiffs have presented evidence that the majority of Plaintiffs' customers are tourists. (Young Decl. ¶ 24.) As early as 1986, the Ad Hoc Committee for a Management Plan for Hanalei Bay and North Shore, Kauai recognized tourists as comprising the demand for commercial activity in Hanalei Bay. (Report to the Legislature at 1, Ex. 1, attached to Defs. Mot.) The Hanalei Estuary Management Plan, adopted by the Kauai Planning Commission in 1992, prioritizes resident recreation over visitor recreation. (Ex. 3 at 6, attached to Defs. Mot.) In a letter to the Board of Land and Natural Resources, State of Hawaii, Howard B. Gehring, as approved by Johns, states: "[T]ourist interest has increased through the years. This has resulted in a proliferation of commercial recreational activities" (Ex. 5 at 2, attached to Defs. Mot. (emphasis added).) At a hearing before the Court, the State conceded that due to the Ban, tourists "can't experience Hanalei Bay in a boat." (Tr. at 35.)

To determine whether a state law violates the Commerce Clause in this situation, the Court will examine (1) whether the state's interest is legitimate, and (2) whether the burden on interstate commerce clearly exceeds the local benefits. *Brown–Forman Distillers Corp.*, 476 U.S. at 579, 106 S.Ct. 2080 (citing *Pike*, 397 U.S. at 142, 90 S.Ct. 844).

2. State Interest

The evidence before the Court is that the aim of the Ban is to reduce the use of Hanalei Bay by commercial vessels catering to tourists. The Hanalei Estuary Management Plan, adopted by the Kauai Planning Commission in 1992, prioritizes resident recreation over visitor

recreation. (Ex. 3 at 6, attached to Defs. Mot.) In a letter to the Board of Land and Natural Resources, State of Hawaii, Howard B. Gehring, as approved by Johns, states in relevant part:

[T]ourist interest has increased through the years. This has resulted in a proliferation of commercial recreational activities, presenting complex resource management situations generated by competing and often conflicting uses. For nearly fifteen years, the residents of Hanalei have been clashing with commercial tour boat companies over the use of commercial vessels in the Hanalei River.

(Ex. 5 at 2, attached to Defs. Mot.) At a hearing before the Court, the State conceded that due to the Ban, tourists "can't experience Hanalei Bay in a boat." (Tr. at 35.)

Eliminating the presence of tourists from the Bay is not a proper reason for the Ban as it directly contradicts the very purpose of the Commerce Clause.

Rather than declare that the aim of the Ban is to eliminate tourists from Hanalei Bay, Defendants point to several reasons for the Ban, including: (1) the preservation and conservation of the Hanalei ecosystem, (2) the alleviation of use conflicts and safety problems, and (3) preservation of the scenic beauty of Hanalei Bay. (Def. Concise St. ¶¶ 17–21, 13a–13k; Ex. 5, attached to Def. Mot.)

*12 The only evidence Defendants present to support their claim that the above three policies are the reasons for the Ban is a letter from Howard B. Gehring (Acting Administrator of the Division of Boating and Ocean Recreation of the Department of Land and Natural Resources), as approved by Johns (Chairperson of the Department of Land and Natural Resources, State of Hawaii. The two-page letter discusses in conclusory fashion the problems associated with the increased tourist interest in the Hanalei Bay area, and the need for more aggressive and responsive management of the area:

Because of the beauty of the area and the variety of wildlife, tourist interest has increased through the years. This has resulted in a proliferation of commercial recreational activities, presenting complex resource management situations generated by competing and often conflicting uses. For nearly fifteen years, the residents of Hanalei Bay have been clashing with commercial tour boat companies over the use of commercial vessels in the Hanalei River.

Commercial vessels result in increase use of river creating congestion in the water and on the land generating traffic and parking requirements. Commercial vessels are generally incompatible with recreational boating, swimming and pole fishing, and safety problems can periodically occur when both are taking place simultaneously. The use of larger commercial vessels and the passenger loads currently allowed impacts the quality of the River and the quality of the experience for the average public users. Additionally, the Hanalei River was designated as a national heritage river because of its beautiful scenic vistas, biological uniqueness and cultural significance. The continued presence of commercial vessels is inconsistent with the heritage river designation. Numerous attempts by government agencies to resolve these issues have resulted in a less than desirable and unacceptable compromise.

Defendants do not present copies of testimony from Hanalei Bay residents, or any specifics about safety and other problems relating to the tour boat companies.

a. Preservation and Conservation of Ecosystem

"A State cannot escape [federal preemption] by cloaking objectionable legislation in the currently fashionable garb of environmental protection." *Douglas*, 431 U.S. at 285 n. 21, 97 S.Ct. 1740. In *Douglas*, the Supreme Court held that state statutes limiting the right of nonresidents and aliens to catch fish in the territorial waters of Massachusetts could not be sustained as having a legitimate conservation purpose because the state made no attempt to restrict the quantity of menhaden caught by her own residents. *Id.* "Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." *Id.*

*13 In Waste Management Holdings, the Fourth Circuit held that the reasonableness of a ban on the transportation of any type or amount of municipal solid waste by federally licensed barges was not supported by the evidence in the record, even when viewed in the light most favorable to the defendants. 252 F.3d at 348.

Here, there is no evidence that the Ban was enacted in response to, or reasonably relates to, a concern for environmental degradation to Hanalei Bay. Former Defendant Gehring testified in a deposition that the Ban was not the product of a study of the adequacy of existing regulation or the actual impact of Plaintiffs' vessels. (Gehring Dep. of Dec. 28, 2000, DN–12, attached to Pls. Mot. filed Jan. 5, 2001.) Further, Gehring testified that he was unaware of any assessment of the environmental impact of commercial vessels operating at Hanalei Bay, that the Boating Division itself lacks the capacity to perform such a study, and that the results of a previous, privately funded study of the impact of motorized vessels on the Hanalei estuary environment were negative. (*Id.* at 113, 118, 157.)

Plaintiffs have presented the Declaration of Richard W. Grigg, Ph.D, Professor of Oceanography, researcher and marine biologist at the University of Hawai'i, who has been qualified by various judges in this Court to testify as an expert witness regarding marine environment and water safety. (Grigg Decl. ¶¶ 1–2, attached to Pls. Sec. Mot.) Grigg is familiar with Hanalei Bay as a recreational surfer and as an expert on marine life and coral reefs for the development of the Princeville Resort in the vicinity of Hanalei Bay. (Id. ¶¶ 5–6.) Grigg has ridden aboard Young's vessel in Hanalei Bay and is informed about the types of vessels operated by Plaintiffs Whitey and Butler. (Id. ¶¶ 8–9.) Grigg

opines that the Ban is unlikely to have any scientifically significant benefits to the ecosystem in Hanalei Bay, and that it is unnecessary and unreasonable from the perspective of marine science. (*Id.* ¶¶ 12–13.)

Defendants have provided no evidence to show that Plaintiffs' vessels cause more damage to the ecosystem in Hanalei Bay than vessels not affected by the Ban. If the motors or the size of the certain vessels give rise to Defendants' concerns, Defendants have the ability to prohibit all motorized vessels, all vessels of a certain size, or all vessels meeting certain criteria relevant to ecological protection and conservation, or other legitimate concerns. If damage to the ecosystem were Defendants' concern, the Ban would prohibit Plaintiffs from operating their vessels in Hanalei Bay, whether or not they were carrying paying passengers. The Ban only prohibits Plaintiffs from operating their vessels commercially, that is, with paying customers aboard. The Ban targets only the *commercial* use of Plaintiffs' vessels, a distinction which has no rational relation to the aim of ecological preservation.

The purported reason of ecological preservation is not rationally related to the terms of the Ban and has not been shown to be based on any factual information

b. Alleviating User Conflicts and Safety Concerns

*14 Defendants state that safety problems caused by "user conflicts" also led to the enactment of the Ban. Although safety is a legitimate concern, there is no evidence that user conflicts gave rise to the Ban, or that a problem of use conflicts is rationally related to the complete exclusion of Plaintiffs' commercial operation of their vessels under the Ban. Cf. Hawaiian Navigable Waters Preservation Soc'y v. State of Hawaii, 823 F.Supp. 766, 775 (D.Haw.1993) ("Defendants present significant evidence that conflicting uses between recreational ocean users and vessels conducting passive mooring activities poses a substantial threat to public safety because of the heavy traffic on the seaways").

Prior to the Ban, Plaintiffs were required, pursuant to their permits, to use a specified ingress/egress zone in the Bay, to limit their speed, and follow other reasonable regulations. Plaintiffs present the deposition testimony of Howard B. Gehring, who was the Acting Administrator of the Division of Boating and Ocean Recreation when the Ban was enacted, who states that the Division of Boating and Ocean Recreation never made the determination that the regulations in Plaintiffs' licenses were inadequate to alleviate the safety concerns regarding user conflicts. (Gehring Dep. at 157, Ex. DN–30, attached to Pls. Sec. Mot.)

Plaintiffs also present the Declaration of Richard D. Grigg, Ph.D, stating that the Ban is unreasonable and unnecessary from the perspective of water safety. (Grigg Decl. ¶¶ 12, 14.) He states: "[T]he operation of Plaintiffs' vessels at the levels permitted by their recently expired permits will not achieve a significant reduction in conflict between ocean users, including vessel-surfer conflicts." (*Id.* ¶¶ 14–15.) He continues: "In my personal experience, surfers paddling out from Black Pot Beach have no difficulty avoiding these vessels during the short period of time (less than 15 minutes) that they are actually underway." (*Id.* ¶ 15.)

In the Final Recommendations of the Ad Hoc Committee for a Management Plan Hanalei Bay/North Shore, Kauai dated March 1987, user conflict is described as a conflict between recreational uses such as swimming, snorkeling, diving and fishing, and both recreational and commercial boating, sailing, windsurfing, and waterskiing. (Final Recommendations of the Ad Hoc Committee for a Management Plan Hanalei Bay/North Shore, Kauai at 2, Ex. 1, attached to Defs. Mot.) Given this definition of user conflicts, user conflicts does not provide a rational reason for prohibiting only commercial tourboat operations in Hanalei Bay. The Ban does not prohibit commercial and recreational fishing boats, and large cruise ships, from operating in Hanalei Bay. Plaintiffs are also allowed to operate in Hanalei without paying customers. (Ex. 8, attached to Defs. Mot.; H.A.R. § 13–256–36.)

There is no rational relationship between the problem of user conflicts and the provisions of the Ban.

c. Preserving Scenic Beauty

*15 Defendants state that preserving the scenic beauty of Hanalei Bay is a goal of the Ban.

A state may not escape the finding of a Supremacy Clause violation "by cloaking objectionable legislation in the currently fashionable garb of environmental protection." *Douglas*, 431 U.S. at 285 n. 21, 97 S.Ct. 1740. It is clear from the evidence before the Court that Defendants contemplate preservation of the scenic beauty of Hanalei Bay as preserving the use of the Bay for local residents only, and for traditional uses that do not include tour boat operations. If the number of people utilizing Hanalei Bay sparks concern, a State might limit the number of people aboard vessels, or limit the size of vessels allowed to use Hanalei Bay. Defendants enforced such a restriction in the permits it issued Plaintiffs in the past.

Defendants do not provide a legitimate, rational explanation of the connection between the Ban and preserving the scenic beauty of Hanalei Bay.

3. Burdens on Interstate Commerce Clearly Exceed the Local Benefits

In weighing the local benefits of the Ban against the substantial burden on interstate commerce, it is clear that the burden is clearly excessive in relation to the local benefits.

The Ban prohibits Plaintiffs' commercial operations in Hanalei Bay. Plaintiffs have based their commercial activity in Hanalei Bay for years. (Butler Decl. ¶ 2, Young Decl. ¶ 21, EG—1, attached to Pls. Mot.) The Ban also effectively denies to tourists the ability to enjoy Hanalei Bay in a boat. (Tr. at 35.) The Ban severely burdens interstate commerce in Hanalei Bay.

The purported reasons for the Ban are unsubstantiated and are inadequate to outweigh the grave burdens on Plaintiffs' operations affecting interstate commerce. In *Southern Pac. Co.*, the Supreme Court stated: "The decisive question is whether in the circumstances the total effect of the law as a safety measure ... is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" *Southern Pac. Co.*, 325 U.S. at 775–76, 65 S.Ct. 1515 (emphasis added).

The severe burdens are not justified by equally significant local benefits. A state may not enact legislation that substantially affects the flow of interstate commerce by "simply invoking the convenient apologetics of the police power." *Id.* at 780, 65 S.Ct. 1515 (quoting *Kansas City S. Ry. v. Kaw Valley Drainage Dist.*, 233 U.S. at 79, 34 S.Ct. 564, 58 L.Ed. 857 (1914); *Buck v. Kuykendall*, 267 U.S. 307, 315, 45 S.Ct. 324, 69 L.Ed. 623 (1925)). "[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (emphasis added).

Compared to the purported benefits, of which Defendants have provided almost no support, the Court finds that the Ban's burdens on interstate commerce clearly exceed its local benefits. The Ban violates the Commerce Clause of the United States Constitution.

III. Equal Protection Clause and Substantive Due Process Clause Theories of Relief

*16 The Court has determined that the Ban violates the United States Constitution under the Supremacy Clause and the Commerce Clause. The Court need not address Plaintiffs' alternative theories of relief under the Equal Protection Clause and the Substantive Due Process Clause of the United States Constitution.

IV. Motion for Preliminary Injunction

Based on the Court's finding that the Ban violates the Supremacy Clause and Commerce Clause of the United States Constitution, the Court GRANTS Plaintiffs' Motion for Preliminary Judgment in accordance with the Court's Minute Order of August 16, 2001.

CONCLUSION

In accordance with the foregoing, IT IS HEREBY DECLARED:

As currently enforced against Plaintiffs, Hawaii Administrative Rule § 13–256–36 is unconstitutional to the extent that it prohibits Plaintiffs' vessels from operating on the navigable waters of Hanalei Bay while carrying fare paying passengers as it violates (1) the doctrine of conflict preemption based on the Supremacy Clause of the United States Constitution, and (2) the Commerce Clause of the United States Constitution.

IT IS HEREBY ORDERED:

- 1. Plaintiffs' Motion for Summary Judgment is GRANTED based on the Supremacy Clause and Commerce Clause theories of relief;
- 2. Defendants' Motion for Summary Judgment is DENIED;
- 3. Plaintiffs' Motion for Permanent Injunction is GRANTED in accordance with the Minute Order of August 16, 2001: Defendants, each of them, together with their employees, successors in office, and all persons acting in concert with them, be and the same are permanently restrained and enjoined from enforcing Hawaii Administrative Rule § 13–256–36, as amended effective November 30, 2000, as to the named Plaintiffs;
- 4. Judgment shall enter in favor of Plaintiffs.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2001 WL 1677259, 2002 A.M.C. 1114

Footnotes

Although the title of Plaintiffs' Motion indicates that Plaintiffs move for summary judgment on Plaintiffs' third and fifth claims for relief only, in Plaintiffs' memorandum, Plaintiffs argue for summary judgment based on the second claim for relief as well. See Pls. Sec. Mot. at 23–27.

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In adopting this regulation in 1993, the Department of Transportation explained:

The benefits of documenting a vessel are practical, legal, and financial. The salient practical benefit (and not coincidentally the reason the concept of Federal documentation exists at all) is to ensure unencumbered interstate and international commerce. This practical benefit is intimately related to the legal benefits attendant upon Federal documentation. The existence of a Federal system of documentation serves to preempt State numbering and regulatory schemes such that a vessel operated under a Federal endorsement (e.g., a coastwise endorsement) is ensured access to State waters for various activities. In fact, the Federal documentation statutes, which date to the earliest days of our Republic, are a direct result of dissatisfaction with impediments to the free flow of commerce once imposed by the several States. That Federal documentation continues to provide this benefit is evidenced by the recurring preemption cases in which a vessel owner or operator invokes the protections of documentation against a State seeking to close its waters to nonresidents for certain activities.

58 Fed.Reg. 60256, 60264 (1993) (emphasis added).

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Examples of potentially reasonable, nondiscriminatory regulations are found in the expired permits of Plaintiffs, which, inter alia, restrict the "selling or providing food, beverages or refreshments for consumption on the properties," mandate that "[n]o direct fueling or refueling of boats from tank trucks and trailers shall be allowed from nor adjacent to the Hanalei Pier and the beach fronting the Black Pot Park," require that the permittee and its passengers "shall be shuttled to the designated ingress/egress zone" rather than arrive individually, requiring that the passengers be accompanied by the permittee or its agents at all times in the sites covered by the permit, and restricting the days on which Plaintiffs may use the designated landing sites. (Ex. 10, attached to Defs. Mot.) Such restrictions may be legitimate and even-handed, and may not violate the Supremacy Clause.

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The Supreme Court has noted the "obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." *Clover Leaf*, 449 U.S. at 470 n. 14, 101 S.Ct. 715.

EXHIBIT 10 Young v. Coloma-Agaran, 340 F.3d 1053, 1055 (9th Cir. 2003)

No. 02-15202 United States Court of Appeals, Ninth Circuit

Young v. Coloma-Agaran

340 F.3d 1053 (9th Cir. 2003) Decided Aug 25, 2003

No. 02-15202.

Argued and Submitted May 9, 2003.

1054Filed August 25, 2003. *1054

Yvonne Y. Izu, Deputy Attorney General, State of Hawaii, Honolulu, HI, for the defendants-appellants.

Dennis Niles, Paul, Johnson, Park Niles, Wailuku, HI, for plaintiffs-appellees Ralph A. Young Whitey's Boat Cruises; Jack Schweigert, Honolulu, HI, for plaintiff-appellee Robert Butler, Jr.

Appeal from the United States District Court for the District of Hawaii; Helen Gillmor, District Judge, Presiding. D.C. No. CV-00-00774-HI.

Before: GOODWIN, RYMER, and T.G. 1055 NELSON, Circuit Judges. *1055

OPINION

GOODWIN, Circuit Judge.

The district court granted summary judgment and a permanent injunction in favor of three commercial tour boat operators who challenged a state regulation that prohibits them from operating their tour boats in Hanalei Bay, located on the northern coast of Kauai. We affirm.

I. BACKGROUND

Ralph A. Young, Whitey's Boat Cruises, Inc., and Robert F. Butler are commercial tour boat operators conducting passenger tours from Hanalei Bay to the Na Pali coast on Kauai. In order to conduct boat tours in Hanalei Bay, the plaintiffs have held at least two types of licenses in the recent past: federal and state.

The U.S. Coast Guard issued the plaintiffs' federal licenses (the "coasting licenses") and these licenses include endorsements allowing licensees to engage in coastwise trade in the navigable waters of the United States, which include Hanalei Bay. The Hawaii Department of Land and Natural Resources' (the "Department") administrative regulations require the plaintiffs to obtain stateissued commercial use permits (the "use permits") to operate in Hanalei Bay. Until recently, state regulations limited the number of use permits issued and imposed certain conditions on the activities of the permittees (e.g., setting numerical ceilings on passengers ferried and trips made). Among other conditions, the use permits contained an automatic termination provision in the event that the Department adopted an administrative rule prohibiting the permitted conduct.

In October 2000, the state adopted the regulation at issue in this case (the "ban"). The ban states in relevant part:

(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.



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(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.

Haw. Admin. R. § 13-256-36. The Department notified the plaintiffs that their use permits would automatically expire on November 30, 2000, the effective date of the ban. On December 1, 2000, the plaintiffs filed their complaint seeking a declaratory judgment and injunctive relief on the ground that the ban violates the federal Constitution.

Both parties moved for summary judgment. The district court granted a permanent injunction in favor of the plaintiffs, concluding that the ban violates the Supremacy Clause of the Constitution because it conflicts with federal licensing laws. The district court also found that the ban violates the Commerce Clause.

II. DISCUSSION

A. FEDERAL PREEMPTION

Federal law may preempt state law in three ways: (1) federal law may explicitly preempt state law in a given area; 12017(2) federal law may implicitly preempt state law by dominating regulation in a given area; or (3) state law may actually conflict with federal law. *Barber v. State of Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994). In the instant case, the plaintiffs argue that the ban actually conflicts with, and therefore is preempted by, federal law.

Actual conflict, or "conflict preemption," occurs 1056"where it is impossible . . . to *1056 comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (internal citation and quotation marks

omitted); see also Service Eng'g Co. v. Emery, 100 F.3d 659, 661 (9th Cir. 1996). To determine whether a conflict exists requires an understanding of both the federal and state regulations, as well as how they interact. See Perez v. Campbell, 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

1. The Coasting Licenses

The coasting licenses are issued pursuant to shipping laws set forth in title 46 of the United States Code. Section 12106 permits issuance of a coasting license to a vessel that

- (1) is eligible for documentation;
- (2)(A) was built in the United States; or
- (B) if not built in the United States, was captured in war by citizens of the United States and lawfully condemned as a prize. . .; and
- (3) otherwise qualifies under laws of the United States to be employed in the coastwise trade.

46 U.S.C. § 12106(a). Eligibility for documentation turns largely on the ownership of the subject vessel. *See* 46 U.S.C. § 12102. A vessel must have a coasting license to be employed in the coastwise trade. 46 U.S.C. § 12106(b); 46 C.F.R. § 67.7. Coastwise trade includes the transportation of passengers. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 215-19, 6 L.Ed. 23 (1824).

Despite the generality of the requirement for a coasting license, or perhaps because of it, courts have broadly construed the scope of the license. As early as 1824 in *Gibbons v. Ogden*, a coasting license has been held to unequivocally grant the authority to carry on the coasting trade. *Id.* at 212. The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from natural law and the Constitution confers absolute control of its regulation to congress. *Id.* at 211; *cf.* 58 Fed.Reg. 60256-01, 60258 (Nov. 15, 1993) (to be codified

at 46 C.F.R. pts. 1 67) ("[T]he long-held policy of the Coast Guard [is] that the right to engage in the restricted trades is an entitlement that appertains to the vessel and arises as a matter of law upon meeting the requisite conditions."). The Coast Guard's regulations reflect the law established in *Gibbons* that a coasting license "entitles a vessel to employment in unrestricted coastwise trade." 46 C.F.R. § 67.19(a).

Since the *Gibbons* decision, several courts have considered federal regulation of navigation and trade licensing on navigable waters. It is well-settled that "[a] state may not exclude from its waters a ship operating under a federal license." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); *see also Florida Lime Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("That no State may completely exclude federally licensed commerce is indisputable....").

The Supreme Court has recognized, however, that the right secured by a coasting license is not boundless. In Douglas v. Seacoast Products, Inc., it expressly noted "the negative implication of Gibbons: that States may impose upon federal licensees reasonable. nondiscriminatory conservation and environmental protection measures otherwise within their police power." 431 U.S. 265, 277, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977). Thus, provided that such regulations do not conflict with federal law, a state maintains 1057power *1057 to adopt such reasonable and nondiscriminatory laws.

2. Hawaii's Ban

We must analyze the Department's ban against this backdrop of expansive federal regulation of navigation and commerce. Hawaii began regulating the use of Hanalei Bay in the mid-1980s in response to user conflicts occurring on the north shore of Kauai. In 1988, a permitting system for up to fifteen commercial vessels was established under the supervision of the Hawaii

Department of Transportation. In 1992, the Department of Land and Natural Resources assumed management of Hanalei Bay without any change to the relevant regulations (although by 1999, the number of use permits issued had dwindled to five).

In 1999, the state considered a proposal to prohibit commercial boating in Hanalei Bay. A report from the public hearing on the proposal indicates that regulators were concerned about putting to rest "years of turmoil" over tourist activities in Hanalei, as well as maintaining the natural beauty of the Hanalei area. Comments from the public were by and large hostile to continued commercial tour boat activities in Hanalei Bay. Approximately five months later, the ban took effect and the Department revoked the plaintiffs' use permits. ¹ 3. Conflict Preemption Analysis

The parties did not brief or argue at trial the effect of Hawaii Revised Statute § 200-6(b), which allows certain vessels to be "anchor[ed], moor[ed], or otherwise place[d]" in Hanalei Bay without a use permit. Therefore, we do not address the issue here.

We conclude that the ban, in conjunction with the relevant federal shipping laws, violates the Supremacy Clause. Simply stated, the ban completely excludes the plaintiffs conducting their federally-licensed tour boat businesses in Hanalei Bay. We are sympathetic to the challenges posed by the user conflicts occurring in the bay. We hold, however, that the state's refusal to issue use permits under any conditions has effectively rendered it impossible for the plaintiffs to comply with both federal and state law in order to ply their trade. See Florida Lime, 373 U.S. at 142-43, 83 S.Ct. 1210.

The state argues that the Department was exercising the state's police power to alleviate user conflicts at Hanalei when it adopted the ban. Indeed, the Supreme Court has held that "[i]n the exercise of that power, the states and their

instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron Portland*, 362 U.S. at 442, 80 S.Ct. 813. However, the Court went on to point out the "basic limitations" of such power: "Evenhanded local regulation to effectuate a legitimate local public interest is valid *unless preempted by federal action*." *Id.* at 443, 80 S.Ct. 813 (emphasis added). Thus, even if the ban is an exercise of concurrent power, the state's contention is immaterial to our analysis; as we have explained above, the ban actually conflicts with the federal licensing scheme.

III. CONCLUSION

Finally, we note that our holding is consistent with the Fourth Circuit's recent decision in *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 348 (4th Cir. 2001), *cert. denied*, 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 142 (2002), where that court struck down a Virginia statute that prohibits barges from transporting municipal

waste on the Rappahanock, James, and York Rivers. In an attempt to distinguish this case from *Waste Management*, the state insists that Hanalei Bay is an insignificant body of water compared to 1058*1058 the three rivers at issue in that case. This argument may support the state's position under a Commerce Clause analysis, but it is of no avail in our preemption analysis.

Because we affirm the judgment of the district court under preemption analysis, we decline to consider whether the ban violates the Commerce Clause.

AFFIRMED.

