



December 6, 2022

SUBMITTED VIA EMAIL TO BLNR.TESTIMONY@HAWAII.GOV

Board of Land and Natural Resources
State of Hawaii
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI, 96813

Re: Testimony of Lisa A. Bail on Behalf of Anthony Hodgson and 2G Vessel Owner Limited for Consideration at the Meeting of the Board of Land and Natural Resources set for December 8, 2022 at 9:15 a.m. (Agenda Item F-3)

Members of the Board of Land and Natural Resources:

On behalf of Anthony Hodgson, the captain of the *Endless Summer*, and 2G Vessel Owner Limited ("2G"), the vessel's owner, Lisa A. Bail submits the following testimony to the State of Hawai'i Board of Land and Natural Resources ("BLNR") for consideration regarding Item F-3 on the Agenda for BLNR's December 8, 2022 Meeting, which is an Enforcement Action for Stony Coral and Live Rock Damage (the "Enforcement Action"). Hodgson and 2G respectfully request that BLNR modify the recommendation of the Division of Aquatic Resources ("DAR") by eliminating or substantially reducing the recommended fine.

Captain Hodgson has sailed the *Endless Summer* throughout the world, and, no matter where he has travelled, he has done his utmost to avoid damage to the environment. Unfortunately, despite the exercise of the same caution in Hawai'i, during the *Endless Summer's* stay, DAR alleges her anchor damaged coral in Kailua Bay on the Big Island.

Based on that alleged damage, DAR recommends a substantial sanction of \$261,281.37. The recommendation is based primarily on two of the sixteen factors that Haw. Admin. Rules (HAR) § 13-1-70(c) directs BLNR to consider before setting a sanction in cases involving civil resource violations: the value of the resource damaged and the costs incurred in investigating the violation. HAR §§ 13-1-70(c)(1) & (c)(4). But BLNR also must assess the defendants' culpability. See HAR §§ 13-1-70(c)(10)-(c)(13). Here, that culpability is lessened for two reasons: (1) the *Endless Summer* took precautions to avoid harm to Hawai'i coral, and (2) DAR itself could have mitigated the

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damage by promptly radioing the *Endless Summer* as soon as it discovered that harm was occurring, but it failed to act.

Before sailing to any new location, the *Endless Summer* takes several steps to avoid harming the environment. Her bridge is equipped with the latest electronic navigational publications. Those publications are generally prepared by national or local government agencies. In most places, they contain specific notations that highlight areas with sensitive marine resources. Captain Hodgson avoids any such areas as a matter of course. Before sailing to a new location, Captain Hodgson also reaches out to local agents. In the unusual event that the charts leave out sensitive marine resources, he relies on the knowledgeable local agents to provide a warning.

The success of Captain Hodgson's precautions at other locations throughout the world is reflected in the *Endless Summer's* record. Other than the damage alleged by DAR, neither the vessel nor Captain Hodgson had caused similar damage to the environment. That history, in itself, warrants a reduction in the recommended fine. HAR §§ 13-1-70(c)(11) (directing BLNR to consider any similar violations in the respondent's history).

The *Endless Summer* took the same care when she sailed to Hawai'i. Captain Hodgson first consulted the electronic navigational publications. A copy of the specific publication that Captain Hodgson consulted is attached as Exhibit A. It provides a detailed description of Kailua Bay and the surrounding coast, but, as Captain Hodgson noted at the time, it did not identify any sensitive marine resources in Kailua Bay. He then reached out to a knowledgeable local agent. He was advised to anchor in deeper water, but his contact did not mention any danger to coral reefs. Captain Hodgson also proactively reached out to Department of Land and Natural Resources to obtain information on appropriate anchorage locations. However, there was no answer when he called. Accordingly, the *Endless Summer* dropped her anchor at a depth of, according to the vessel's depth sounder, approximately 100 feet.

In short, the *Endless Summer* took exactly the same precautions that had proved reliable in the past. The Hawaii Administrative Rules recognize that Captain Hodgson's precautions should be considered by BLNR before it sets a proposed fine. HAR § 13-1-70(c)(13) (directing BLNR to consider any "voluntary actions taken by the respondent to mitigate or avoid any damages or injuries resulting from or threatened by the violation").

Finally, some or most of the alleged damage could have been mitigated by prompt action on the part of DAR. According to DAR's submission, DAR agents were informed of the alleged damage at approximately 5 p.m. on September 28, 2022. No one contacted the *Endless Summer* until about 10 a.m. on the next day, approximately 17 hours later.

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As soon as Captain Hodgson was notified of DAR's concerns, he took immediate action to leave the area. It would have been simple for DAR to contact the *Endless Summer* when it first discovered the issue—the *Endless Summer*'s VHF radio was monitoring the proper frequencies. Had DAR done so, any damage that occurred between 5 p.m. on September 28 and 10 a.m. the next day could have been avoided. That reality is also appropriate for BLNR to consider. HAR § 13-1-70(c)(10) (directing BLNR to consider the "level of the respondent's culpable intent as compared to the state's responsibility in proper signage, other actual or constructive notice, enforcement, and promotion of public awareness and education").

In sum, Captain Hodgson took care to avoid the very damage that occurred here. And, even after his precautions failed, DAR could have mitigated the damage by prompt action. Based on both considerations, Captain Hodgson and Hines respectfully request that BLNR: (1) eliminate all penalties sought against Captain Hodgson individually; and (2) reduce the penalty sought from 2G by fifty percent or eliminate that penalty altogether.

Very truly yours,

GOODSILL ANDERSON QUINN & STIFEL

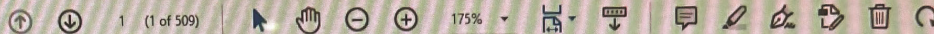
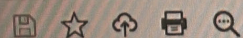
A handwritten signature in black ink, appearing to read "Lisa A. Bail", written in a cursive style.

Lisa A. Bail

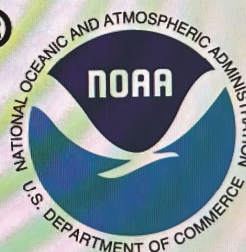
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Attached Exhibit A

EXHIBIT A



UNITED STATES Coast Pilot®



10

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(269)

**ENC - US5HA17M
Chart - 19331**

(270) Kailua Bay, 50 miles northwest of Kalae, is a dent in the coast at the south end of the flat plain that extends north to Kawaihae Bay.

(271) Kailua, on the north side of the bay, formerly a barge terminal, is now used by cruise and charter boats. Large ships anchor offshore, and ships' tenders are used for transportation to shore. Kailua Light (19°38'16"N., 156°00'03"W.), 32 feet above the water, is shown from a white pyramidal concrete tower on Kukailimoku Point, which is on the northwest side of the bay entrance. Also prominent is the church spire east of Kailua pier and the radio tower northwest of the pier.

(272) No breakwater protects this small exposed harbor. Access is good, and no channel is required to reach open water. The turning basin east of the pier is 12 to 20 feet deep and about 500 feet square. The approach to the pier is marked by a 023° directional light. The west side of the pier has a surfaced boat-launching ramp. The east side of the pier has a pump-out station and a marine hoist with a maximum capacity of 2,000 pounds.

(273)

**ENCs - US5HA14M, US4HA14M
Chart - 19327**

(274) The coast between Kailua Bay and Kawaihae Bay is a black, jagged mass of lava. The numerous capes and indentations are caused by the lava flows over the level country. Between Keahole and Upolu Points, the trade winds draw over the mountains, at times causing a very strong offshore wind. Vessels anchoring in this vicinity should be prepared to use both anchors, as the prevailing north current prevents laying to the wind.

(275) Kaiwi Point, about 2 miles northwest of Kailua, is low and black, with some small patches of white sand. Shoal water extends about 0.3 mile offshore on the south side of the point, but on the west side the 100-fathom curve is only 0.3 mile offshore.

(276) Honokohau Small-Boat Harbor, at the head of Honokohau Bay, about 1 mile north of Kaiwi Point, is entered through a marked dredged channel that leads to two basins in the harbor. Two boat ramps, a haul-out ramp and moorings are available in the harbor. A wharfinger is available on weekdays from 0630 to 1730 and can assist in arranging delivery of petroleum products by tank truck. A fuel facility and oil disposal shed are available. The harbor office phone number is 808-329-4215.

(277) Keahole Point, 57 miles northwest of Kalae, is the west extremity of Hawaii Island. Keahole Point Light (19°43'40"N., 156°03'40"W.), 43 feet above the water, is shown from a post with a black and white diamond-shaped dayboard. Kona International Airport, 1.2 miles east-northeast of the point, is prominent when transiting along the coast. An aerobeacon atop the 65-foot control

tower is more prominent at night than Keahole Point Light. The point is low and well defined and consists of black lava with some small vegetation. White patches of sand may be seen between the fingers of the lava. A north current sets past Keahole Point. Frequently there are small tide rips near the point, and 2 miles to the north the rips are violent when the northeast trade winds are strong. A berth of 0.5 mile clears the point in deep water. Mariners should not anchor within 1 mile offshore or 500 yards north and 1000 yards south of Keahole Point because of submerged pipelines.

(278) Puu Waawaa, 13 miles east of Keahole Point, is prominent and can often be seen when Hualalai is hidden by the clouds. The mountain, 3,971 feet high, is dome-shaped, with deep gorges on its side, and rises about 1,000 feet above the slope on which it stands.

(279) Between Makolea Point and Kawili Point, 3 and 4 miles north of Keahole Point, shoal water extends about 0.7 mile offshore. The sand and coral bottom is plainly visible. A current sets northeast along this coast, and there are tide rips off Makolea Point. Offshore, beyond the 2,000-fathom curve, the current has been observed to set east toward the coast. When a heavy swell is running, breakers extend about 0.5 mile offshore. Strangers should give these points a berth of 1.5 miles. The village of Mahaiula is at the head of the unimportant bay between the two points. Between Keahole and Mano Points are several small bays that are rarely used.

(280) Kuili, 5 miles north of Keahole Point and 0.3 mile inland, is a brown crater 342 feet high. The hill marks the seaward end of a series of cones on the ridge extending from the northwest slope of Hualalai. An extensive shoal extends about 0.5 mile offshore about 2 miles north of Kuili and between the villages of Kukio and Kaupulehu.

(281) Mano Point, 9 miles northeast of Keahole Point, is a poorly defined, rounded, flat mass of lava.

(282) Kiholo Bay, 11 miles northeast of Keahole Point, indents the coast 0.5 mile and is 1 mile wide. The head of the bay is foul, but local vessels have anchored close to the black lava shore on the south side. A southwest current, with an average velocity of about 0.5 knot, has been observed in Kiholo Bay. The village of Kiholo consists of a few houses in a coconut grove at the head of the bay.

(283) Puu Anahulu, 4 miles east of Kiholo, is a prominent yellowish cone, 1,523 feet high, with lava flows on three sides.

(284) Kapalaia is a village on the south side of a small bight 3.5 miles northeast of Kiholo. The bight is foul and can only be used by small boats with local knowledge.

(285)

**ENCs - US5HA16M, US5HA14M, US4HA14M
Charts - 19330, 19327**

(286) Puako Bay is a small indentation in the coast 20 miles northeast of Keahole Point. There is no protection for large vessels, and very little is available for small





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Members of the Board of Land and Natural Resources:

On behalf of Anthony Hodgson, the captain of the *Endless Summer*, and 2G Vessel Owner Limited ("2G"), the vessel's owner, Lisa A. Bail submits the following supplement to her testimony to the State of Hawai'i Board of Land and Natural Resources ("BLNR") for consideration regarding Item F-3 on the Agenda for BLNR's December 8, 2022 Meeting, which is an Enforcement Action for Stony Coral and Live Rock Damage.

Captain Hodgson and 2G request a contested case hearing in this matter.

Very truly yours,

GOODSILL ANDERSON QUINN & STIFEL

Lisa A. Bail

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