

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES OFFICE OF
CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i

File No: CC: OA 21-03
ENF: OA 21-03

October 27, 2023

**Board of Land and
Natural Resources
State of Hawai'i
Honolulu, Hawai'i**

REGARDING: Request for Approval of Emergency Conservation District Use Application (Emerg. CDUA) OA 24-01 Related to the Settlement Agreement for Contested Case CC: OA 21-03 for ENF: OA 21-03 and the Removal of Concrete Shoreline Protection Structure (Unauthorized Seawall) and Installation of Temporary Shoreline Structure Located Makai of 59-175 C Ke Nui Road, Tax Map Key: (1) 5-9-002:026

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

APPLICANT: SEAMAIDS LLC and members Brandee and Liam McNamara (collectively, the "McNamaras")

AGENT: Forest B. Jenkins
Goodsill Anderson Quinn & Stifel LLP

LOCATION: Pūpūkea-Paumalū Beach Lots, Ko'olauloa, O'ahu, Tax Map Key (TMK): (1) 5-9-002:026 (seaward)

LANDOWNER: State of Hawai'i

SUBZONE: Resource

Exhibit 1: Location map

Exhibit 2: Settlement Agreement for Contested Case OA 21-03

Exhibit 3: Photos of shoreline area fronting parcel 026

Exhibit 4: Figures and schematics provided by the McNamaras

BACKGROUND

On January 22, 2021, the Board of Land and Natural Resources (BLNR) found the McNamaras in violation of Hawaii Revised Statutes (HRS) 183C-7 for construction of an unauthorized seawall within the Conservation District (Ref. ENF: OA 21-03).¹ The McNamaras requested a Contested Case Hearing after the BLNR's decision.

Contested Case CC: OA 21-03 ended in a settlement agreement approved by the BLNR on August 26, 2022. The settlement agreement is attached as **Exhibit 2**. It requires that the seawall and all other unpermitted shoreline protection devices (e.g. any sand bags, sand "burritos", and sand blankets) be removed by December 31, 2023. It also allows for an application for a temporary erosion control structure for one year to cover/protect the stretch of property facing the ocean following removal of the seawall.

The first four photos of **Exhibit 3** pages 30-33 show the seawall and all other unpermitted shoreline protection devices (e.g. any sand bags, sand "burritos", and sand blankets) that will be removed. The fifth photo of **Exhibit 3** shows the approximate location of the proposed temporary structure on page 34.

SETTLEMENT AGREEMENT

Condition No. 3 in section B. SETTLEMENT TERMS of the settlement agreement states, in relevant parts (see **Exhibit 2**, pages 18-19):

The Petitioners may apply for a permit to install a sufficient number of temporary erosion control structures to cover/protect the entire stretch of Property facing the ocean (or in other words no less protected space than that which was protected by the Seawall). Pursuant to Hawai'i Administrative Rules ("HAR") § 13-5-35, the Chairperson of the Board or the Deputy Director of the Department will issue the permit upon OCCL's processing of a satisfactory application for such structures and OCCL's recommendation to the Chairperson or Deputy Director for approval ... A completed permit application will not be unreasonably denied and OCCL will provide its recommendation in favor of issuance of the permit to the Chairperson of the Board or the Deputy Director upon OCCL's processing of a satisfactory completed application as discussed therein.

AUTHORITY FOR GRANTING EMERGENCY PERMITS

The authority for the granting of emergency permits is provided in Hawai'i Administrative Rules (HAR) §13-5-35 (a), which states "*Notwithstanding any provision of this chapter, the chairperson or deputy director of the department in*

¹ For details, see Staff Report for Item K-3 on the BLNR's January 22, 2021 agenda (ENF: OA 21-03), available at, <https://dlnr.hawaii.gov/wp-content/uploads/2021/01/K-3.pdf>.

the absence of the chairperson may authorize through an emergency permit any land use deemed to be essential to alleviate any emergency that is a threat to public health, safety, and welfare, including natural resources, and for any land use that is imminently threatened by natural hazards. These actions shall be temporary in nature to the extent that the threat to public health, safety, and welfare, including natural resources, is alleviated (e.g., erosion control, rockfall mitigation). The emergency action shall include contingencies for removal methods, estimates for duration of the activity, and future response plans if required by the department.”

PROPOSED USE

The settlement agreement requires that the seawall and all other unpermitted shoreline protection devices be removed by December 31, 2023, and allows for an application for a temporary erosion control structure to cover/protect the stretch of property facing the ocean following removal of the seawall.

The McNamaras propose the following demolition and removal plan for the unpermitted structures, and construction and installation of the proposed temporary erosion control structure:

I. Demolition and Removal of Seawall and all other Unpermitted Shoreline Protection Devices

1. Equipment to be used: An excavator with a hoe ram is proposed for demolition. The proposed excavator will access the beach by through the County Beach Right of Way (BROW) 280A, as shown on **Exhibit 4**, pages 35-36. A 45 ton-crane will be utilized for large pieces of debris removal from the shoreline. The crane will be staged in the right-of-way flatbed trucking and roll-off dumpsters will be utilized to haul debris to the appropriate recycling facilities. BROW 280A will be sued for access and staging during heavy construction activities.²
2. Staging area: Upon approval from the City and County of Honolulu, the yard areas on either side of the dwelling and beach area will be used as active construction and staging areas. Contingent upon obtaining the appropriate approval, the contractors will temporarily block BROW 280A for the safe removal of the concrete and timber structure and other unauthorized erosion control materials.
3. Inventory of materials in the unauthorized structure: Polypropylene tarps will be used to catch concrete debris during removal and demolition of the wall.

² The proposed use of heavy machinery on the public beach/State-owned submerged lands will be subject to Board review. The proposed use of the County ROW (280A) will require authorization from the relevant County agency.

The shoreline area surrounding the area will be excavated to locate debris that may have drifted from the original installation location and removed along with the existing unauthorized structures and materials. All materials will be documented and safely relocated to the staging area along the right of way for recycling and disposal.

4. Materials and Locations for recycling and disposal: Concrete will be recycled with Samson, a local concrete recycling company in Kapolei. Steel will be removed from the concrete and recycled at Schnitzer recycling in Kapolei. Timber will be disposed of in the PVT Landfill in Waianae. If approved by the Board and the County, the proposed excavator will access the beach through BROW 280A.
5. Documentation of demolition and removal activities: The demolition and removal activities will be documented by photographs taken each day during steps of the removal process, and be provided to DLNR OCCL during removal and reconstruction. A daily log of activities will be kept that includes photographs and written explanations of what materials were removed, the quantities of removal, and at which locations the removal and disposal took place. The McNamaras will submit their log to OCCL via email daily and at the end of each week. Hard copies of removal documentation and daily and weekly updates will be provided to OCCL as well.

Construction and installation of the temporary erosion control structure is proposed to begin once the unauthorized seawall and all other unpermitted shoreline protection devices have been removed. All excess debris and materials will be cleared from the beach and the beach shall be restored to an appropriate condition for safe public transit.

II. Construction and Installation of Temporary Erosion Control Structure

1. A twenty-foot-wide trench will be excavated along the base of the slope fronting the property to mean sea level, and extend approximately fifteen to eighteen feet seaward of the existing erosion scarp. The application states that the trench is needed to support the structural integrity of the structure.
2. A heavy-weight geotextile filter fabric will be placed over the slope and across the trench. A sand-filled geotextile fabric tube will be placed over the filter fabric in the trench.
3. Six rows of sand-filled geotubes (sometimes called "burritos") will be installed along the base of the slope. See **Exhibit 4**, pages 36-37. Each proposed geotube will be approximately five to six feet wide and two to three feet tall, and contain sand from the shoreline area fronting the subject property. Sand will be placed in a geosynthetic blanket, wrapped to form the tube, and then tied closed using polypropylene ropes. A scour apron, or geotextile blanket, will wrap the system to hold the geotubes together and provide structural integrity while providing a buffer between the waves and sand behind the temporary erosion control structure. The sand-filled

geotubes and scour apron which will wrap the system will be anchored approximately every five feet horizontally across the fifty-foot length to stabilize the system.

4. The underlying geotextile filter fabric will be folded up over the front face of the stacked geotubes and slope. The loose ends of the fabric will be secured at the top of the structure and at the edges of the adjoining bundles using polypropylene rope. The structure will be secured against the sloped bank with a batter board (temporary framing device) and soil anchors driven into the property along the top of the bank. After the construction and installation of the temporary erosion control structure is completed, the batter boards will be removed.
5. Per the application, the total amount of material to be used is:
 - a) 7,000 sq. ft of heavy-weight geotextile filter fabric for the liner and sand-filled geotubes,
 - b) 500 yards of polypropylene rope,
 - c) 85 soil anchors (composed of cable and an anchor), and
 - d) 175 cubic yards of sand from the area makai of the subject property.

ANALYSIS

The coastal environment at the subject property is characterized by a seasonally variable beach backed by an elevated sand berm approximately twenty to twenty-five feet high. This active high-wave berm feature underlies many of the shore-front properties along this particular area on the North Shore of O'ahu. Erosion from seasonal waves combined with a long-term trend of beach erosion has created a steep eroded bank (scarp) in the backshore berm. See **Exhibit 3**, pages 31-32.

Condition No. 3 in section B. SETTLEMENT TERMS of the settlement agreement states, in relevant part (see **Exhibit 2**, page 19):

The permit will begin to run from the date the Seawall is removed, as long as the Seawall is removed by December 31, 2023, or a further deadline approved by the Board. The Petitioners will submit proof of removal to OCCL. The maximum amount of time that such temporary erosion control structures will be authorized to installed is one year. Prior to the end of the one year, if the Petitioners would like to keep the temporary structures longer, a written request to the Department together with an environmental assessment that evaluates the effect of the temporary erosion control structure must be submitted for review and approval by the Board. Hawai'i statutes and administrative rules will also require a Conservation District Use Permit for the use of State lands.

Staff understands that most of the proposed activities will occur on State submerged land within the Resource Subzone of the State Land Use Conservation District, makai of where the shoreline would likely be determined pursuant to Hawaii Administrative Rules (HAR) Chapter 13-222 Shoreline Certifications.

In conformance with Hawaii Revised Statutes (HRS) Chapter 343, as amended, and HAR Chapter 11-200.1-16, the proposed uses fall under **General Exemption Type 1 Part 1 #1** *Removal of boulders, rocks, hazardous trees, marine debris, and other similar hazards necessary to maintain lands and waters in a safe condition;* **Type 1 Part 2 #1** *Mitigation of any hazardous conditions that present imminent danger as determined by the Department Director and that are necessary to protect public health, safety, welfare, or public trust resources;* **Type 4 Part 2 #1** *Upon determination by the Department Director that an emergency exists, emergency mitigation and restoration work to prevent further damage from occurring and to restore the topographical features and biological resources;* and **Type 6 Part 1 #5** *Demolition and removal of unauthorized improvements.* The City and County of Honolulu Department of Parks and Recreation concurred with the proposed exemption.

Staff notes that the HRS Chapter 343 and HAR § 11-200.1-16 exemptions are based on the temporary erosion control structure being authorized for one year. If the temporary erosion control structure remains longer than one year, then these exemptions would no longer be applicable.

Any shoreline hardening structure(s) that remains longer than one year may also not be compliant with Act 16 Sessions Law of Hawaii (SLH) 2020 which prohibits shoreline hardening structures, such as seawalls and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities such as the subject area.

DISCUSSION

Emergency permits are generally approved by the Chairperson of the Board of Land and Natural Resources or their Deputy Director. In this case the Chair has determined that the proposed use and public interest requires Board review regarding this matter.

The beaches of Hawai'i are held in trust by the State for the benefit of present and future generations. Additionally, the beaches of O'ahu's north shore are some of the state's most valued natural resources as well as an attraction that attracts residents and visitors who support community economic activities key to the area. The Paumalū-to-Pūpūkea stretch of beach, in particular, is one of the more famous beaches in the area and is heavily utilized by the public, both residents and visitors alike, at all times of the year.

Homes located in the backshore of O'ahu's north shore and this particular area are in a precarious position since geologically, many of these areas are made up of

sandy high-wave and/or storm berms. Generally, these geological features are known to be transient and an active part of the beach system, and this is especially true for the north shore since it is influenced by some of the most extreme wave energy in the world. The Department has worked with landowners to offer temporary shoreline protection (sand pushes or burritos), which were intended to provide time for landowners to hire consultants to assess these hazards and identify options. OCCL is not aware if these shoreline property owners have utilized this time to hire consultants and develop long-term plans.

Unfortunately, these temporary erosion control structures have led to obvious degradation of the public beach resource. Further, the vast majority of these structures are out of compliance, have expired, and have not been removed. Other measures typically employed to manage beach erosion include beach restoration and more permanent shoreline hardening; however, beach restoration is likely not feasible in this area since sand moves so quickly by extreme coastal processes, and shoreline hardening along sandy beaches has been prohibited as part of Act 16 SLH 2020 in an attempt to preserve public beach resources as well as cultural and recreational activities. While it does not appear that there are a lot of options for shoreline residential structures to stay or adapt in place in this particular area given its coastal geological features, coastal processes, and recreational and cultural uses, the Department continues to work alongside various agencies to improve our State's resilience to increasing coastal hazards and sea level rise.³

Given these environmental conditions in this area, the known impacts of shoreline hardening structures on the State's public trust resources, and the long history of permit non-compliance in the region, landowners should expect far more stringent conditions on work in the shoreline than what has been required in the past.

We understand the precarious situation of these houses given the increase in sea level rise and coastal erosion, with houses built on sand banks such as the dwelling on the subject parcel. We also understand the significant loss of beach for the public with shoreline hardening. Continuous temporary emergency permits for private shoreline reinforcement do not address these issues.

A requirement of emergency authorizations is that the emergency action shall include, but not be limited to, contingencies for removal methods and future response plans, as outlined in HAR §13-5-35 Emergency permits.

The McNamaras have stated that they have retained a licensed civil engineer to assist with the development of the required long-term plan for erosion

³ See Fletcher, C.H., Romine, B.M., Genz, A.S., Barbee, M.M., Dyer, M., Anderson, T.R., Lim, S.C., Vitousek, S., Bochicchio, C. and Richmond, B.M., 2012. National assessment of shoreline change: Historical shoreline change in the Hawaiian Islands: U.S. Geological Survey Open-File Report 2011-1051, available at, <http://pubs.usgs.gov/of/2011/1051/>; and, https://tidesandcurrents.noaa.gov/sltrends/sltrends_station.shtml?id=1612340.

management, and that the following measures are being investigated as possible long-term responses:

- Installing soft armoring such as a natural or living shoreline, which would include a combination of some offshore breakwater and living vegetation options.
- Installing a stone rip rap bank face. The McNamaras note that this approach requires underlying soil to be stable and will require further investigation.
- Retreat, including structural alterations to remove or relocate the dwelling or portions of it more landward on the subject property which will require review and potentially authorization from the County.
- Community-wide measures including the installation of revetments, groins, and breakwaters. The McNamara's acknowledge that there may be legal issues with installing revetments.

Staff notes that many of these proposed long-term responses do not appear to comply with Act 16 SLH 2020, which amended HRS §205A-2 Coastal Zone Management Program, to *prohibit construction of private erosion-protection structures seaward of the shoreline, except when they result in improved aesthetic and engineering solutions to erosion at the sites and do not interfere with existing recreational and waterline activities.*

Staff also notes that it has been approximately three years since the seawall fronting the subject property failed, and that the environmental review, disclosure studies, and public and agency consultation for a potential application to install breakwaters and groins in this area has not begun.

The McNamaras have stated that they are willing to put up a removal bond and this should be an element of the proposed land disposition for the use and occupancy of State lands.

Since the passage of Act 16 SLH 2020 and given the history of alleged noncompliance with the emergency authorizations for temporary erosion control structures, OCCL has only recommended approving emergency permits for shoreline erosion control devices in very limited cases. In this case, the emergency permit is tied into a settlement agreement that will result in the removal of unauthorized shoreline hardening material and other debris, will be limited to one year, and will be associated with a removal bond that will allow the State or County government to remove the temporary structure should the permittees fail to comply with the terms of the authorization.

Additionally, Act 209 was passed during SLH 2022 and amended HRS §171-55 Permits. to state *(b) In each emergency permit for the installation of a sandbag, the board shall include as a condition a requirement for the attachment of identifying information, including the permittee's contact information and the permit number, to the sandbag. The board shall specify the form and manner in which*

the identifying information shall be attached to the sandbag. This requirement has been included as recommended condition number nine below subject, but not limited to, the BLNR's specifications regarding the form and manner in which identifying information shall be attached to the sandbags or other erosion control materials approved by this authorization.

OCCL has reviewed the proposal for a temporary erosion control structure in the Conservation District Resource Subzone and shoreline area fronting TMK: (1) 5-9-002:026 and finds that it complies with the settlement agreement for Contested Case OA 21-03.

Staff, therefore, recommends the following:

RECOMMENDATION

That the Board of Land and Natural Resources approve Emergency CDUP OA 24-01 for the Removal of Concrete Shoreline Protection Structure (Unauthorized Seawall and erosion control materials) and Installation of Temporary Shoreline Structure Located Makai of 59-175 C Ke Nui Road, Pūpūkea-Paumalū Beach Lots, Ko'olauloa, O'ahu Tax Map Key: (1) 5-9-002:026 (seaward) subject to the following conditions:

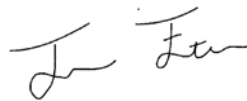
1. It is understood that the emergency temporary emergency erosion control structure as described above and indicated in Figures 1, 2, and 3 is a temporary response to address a safety hazard to the existing single-family residence on the subject property, which is threatened by chronic beach erosion. **The material is authorized as a temporary erosion control measure for one (1) year starting from the date of removal of the seawall or December 31, 2023, to December 31, 2024, whichever is sooner, unless otherwise authorized by the BLNR.** Subsequent erosion control efforts that call for modification, other than the maintenance of the proposed structure, will require a new application. At the end of the authorization period (**one year from the date of the removal of the seawall or December 31, 2024, whichever is sooner**), unless otherwise authorized by the BLNR; all materials shall be removed, and the area restored to a more natural state;
2. The permittee shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of this chapter;
3. The permittee, their successors and assigns, shall indemnify and hold the State of Hawai'i harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;

4. The permittee shall obtain right-of-entries (ROEs) from the Department of Land and Natural Resources, further subject to any terms and conditions prescribed by the Chairperson for the use of State lands. Please contact Oahu District Land Division Office at (808) 587-0433 for further details;
5. The permittee shall comply with all applicable Department of Health Administrative Rules;
6. Unless otherwise authorized, any work or construction to be done on the land shall be completed by December 31st, 2023. Failure by the permittee to complete any work or construction to be done on the land by December 31st, 2023, may lead to further fines and enforcement actions in accordance with the BLNR's approved settlement agreement in ENF: OA 21-03 on August 26th, 2022. The permittee shall notify the department in writing at least 24 hours prior to initiating construction and when it is completed;
7. Prior to construction and installation of the temporary erosion control structure, the permittee shall notify the department that the seawall and all other unpermitted shoreline protection devices have been removed to allow the department to conduct a site visit to confirm removal. The permittee shall ensure that construction and installation activities for the approved temporary erosion control structure shall not commence until the department has given confirmation that the seawall and all other unpermitted shoreline protection devices (e.g. any sand bags, sand "burritos", and sand blankets) have been removed. Failure to do so may result in potential enforcement actions and fines;
8. The permittee shall submit a completion report for the project to the OCCL within sixty (60) days of completion of construction of the temporary structure. It will summarize the construction and detail of any deviation from the proposed plans as well as provide a summary of the beach conditions since installation. The report will also include a photo summary of the temporary structure and beach conditions with documentation of any alterations or repairs;
9. The permittee shall submit evidence with the completion report of compliance with Act 209, SLH 2022 and HRS §171-55, which requires identifying information be attached to each installed sandbag or geotube. The information shall include, but not be limited to, the permittee's contact information and permit number and subject to further specifications by the BLNR;
10. Work shall be conducted at low tide to the most practical extent possible and no work shall occur during high surf or ocean conditions that will create unsafe work or beach conditions;
11. Appropriate safety and notification procedures shall be carried out. This shall include high visibility safety fencing, tape, or barriers to keep people away from the active construction site, and a notification to the public informing them of the project. All barriers shall be removed once the project

- is complete to allow full public access laterally along the beach and alongshore walkway;
12. The applicant shall implement standard Best Management Practices including the ability to contain and minimize silt in nearshore waters and clean up fuel, fluid, or oil spills immediately for projects authorized by this letter. Equipment must not be refueled in the shoreline area. If persistent turbidity or other unusual substances are observed in the water as a result of the proposed operation, all work must cease immediately to ascertain the source of the substance;
 13. All placed material shall be free of contaminants of any kind including: excessive silt, sludge, anoxic or decaying organic matter, turbidity, temperature or abnormal water chemistry, clay, dirt, organic material, oil, floating debris, grease or foam or any other pollutant that would produce any undesirable condition to the beach or water quality;
 14. Any materials that become liberated from the structure must be immediately removed from the beach or ocean;
 15. No contamination of the marine or coastal environment (trash or debris) shall result from project related activities authorized under this authorization;
 16. The permittee understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
 17. Transfer of ownership of the subject property includes the responsibility of the new owner to adhere to the terms and conditions of this authorization;
 18. In issuing this permit, the Department and the Chairperson have relied on the information and data that the permittees have provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the Department may, in addition, institute appropriate legal proceedings;
 19. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the permittee shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
 20. Obstruction of lateral shoreline access shall be avoided or minimized;
 21. The activity shall not adversely affect a federally listed, threatened, or endangered species or a species proposed for such designation, or destroy or adversely modify its designated critical habitat;
 22. The activity shall not substantially disrupt the movement of those species of aquatic life indigenous to the area, including those species which normally migrate through the area;
 23. Artificial light from exterior lighting fixtures, including but not limited to floodlights, uplights, or spotlights used for decorative or aesthetic purposes,

- shall be prohibited if the light directly illuminates or is directed to project across property boundaries. All exterior lighting shall be shielded to protect the night sky;
24. The permittee acknowledges that the approved work shall not hamper, impede, or otherwise limit the exercise of traditional, customary, or religious practices of native Hawaiians in the immediate area, to the extent the practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
 25. Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact SHPD ((808) 692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary;
 21. The permittee shall remove and properly dispose of any debris encountered on the beach during the removal and installation of the erosion control measures. Any materials that come loose from the temporary erosion control measures shall be repaired or discarded as soon as possible so they do not end up in the beach or marine environment;
 22. At the conclusion of the temporary use, the permittee shall clean and restore the Conservation District to a condition acceptable to the Chairperson;
 23. The Department reserves the right to impose additional terms and conditions on projects authorized under this letter, if it deems them necessary; and
 24. Failure to comply with any of these conditions shall render a permit void under the chapter, as determined by the Chairperson or Board.

Respectfully submitted,



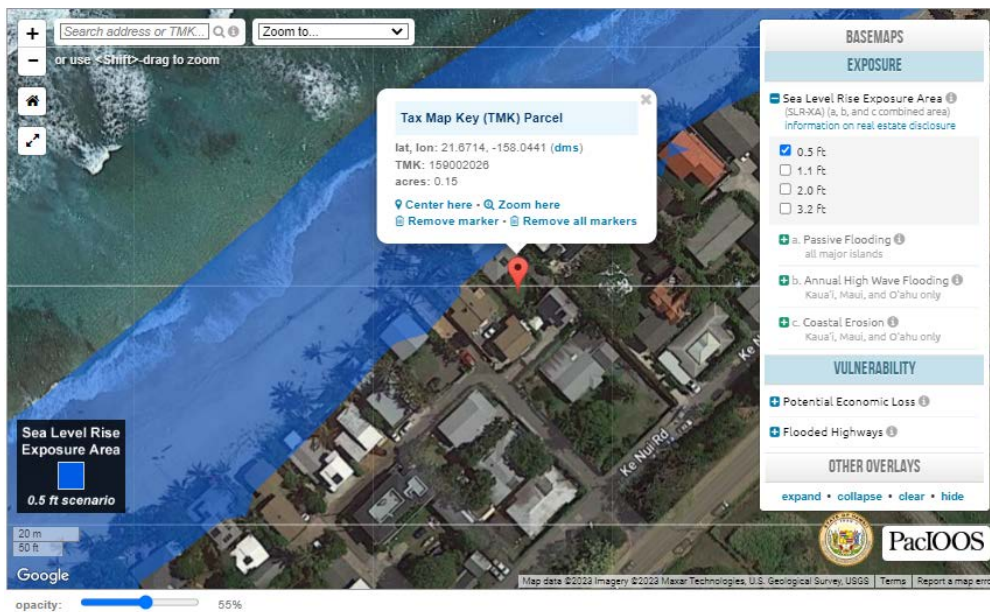
Trevor Fitzpatrick, Staff Planner
Office of Conservation and Coastal Lands

MC

Approved for submittal:



DAWN N. S. CHANG, Chairperson
Board of Land and Natural Resources



Plat Area: (1) 5-9-002
TMK: (1) 5-9-002:026 Marker

at 0.5-ft ≈ 2030

HOLLY T. SHIKADA 4017
Attorney General of Hawai'i

LINDA L.W. CHOW 4756
LAUREN K. CHUN 10196
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
Room 300, Kekuanao'a Building
465 South King Street
Honolulu, Hawai'i 96813
Telephone: (808) 587-2992

Attorneys for THE OFFICE OF CONSERVATION AND COASTAL LANDS, DEPARTMENT
OF LAND AND NATURAL RESOURCES, STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER of a Contested Case) DLNR File No. OA-21-3
Regarding Enforcement Action OA-21-03 for)
the Alleged Construction of an Unauthorized) **SETTLEMENT AGREEMENT**
Erosion Control Structure Located along the)
Coastline within the Conservation District by)
Liam McNamara and Brandee) Hearings Officer: Dawn N.S. Chang, Esq.
McNamara/Seamaids LLC at 59-175C Ke Nui) Contested Case Hearing Date: May 16, 2022
Road, Paumalū, O'ahu TMK: (1) 5-9-002:026)
(Seaward))
_____)

SETTLEMENT AGREEMENT

This Settlement Agreement (the “**Agreement**”) is entered into by and between Seamaids LLC, Liam McNamara, and Brandee McNamara (“**Petitioners**”), and the Office of Conservation and Coastal Lands (“**OCCL**”) of the Department of Land and Natural Resources, State of Hawai'i (“**Department**”), and is hereby approved by the Board of Land and Natural Resources (the “**Board**”), effective as of August 26, 2022. Petitioners and OCCL are from time to time referred to jointly as the “**Parties**.”

RECITALS

WHEREAS, Petitioners are the owners of an oceanfront residential property located at 59-175C Ke Nui Road, Hale‘iwa, O‘ahu, 96712, Tax Map Key No. (1) 5-9-002:026 (the “**Property**”), having purchased the Property in 2019; and

WHEREAS, between the Property and the ocean is a seawall constructed of concrete, wood, and rebar (the “**Seawall**”); and

WHEREAS, Petitioners contend that the Seawall was built prior to October 1, 1964 and is a legally nonconforming structure, and OCCL acknowledges that the Seawall has existed since at least September 1996; and

WHEREAS, OCCL initiated an enforcement action against the Petitioners for the alleged unauthorized repair/reconstruction of the Seawall which allegedly took place in August 2020; and

WHEREAS, the enforcement action was brought before the Board on January 22, 2021, and the Board voted to order the removal of the Seawall within one-hundred and eighty days and to impose a \$30,000.00 fine on the Petitioners, which could be credited towards the removal of the Seawall; and

WHEREAS, the Petitioners orally requested a contested case and timely perfected their request by filing a written petition on January 29, 2021; and

WHEREAS, a contested case was convened under the caption and file number: *In the Matter of a Contested Case Regarding Enforcement Action OA-21-03 for the Alleged Construction of an Unauthorized Erosion Control Structure Located along the Coastline within the Conservation District by Liam McNamara and Brandee McNamara/Seamaids LLC at 59-*

175C Ke Nui Road, Paumalū, O‘ahu TMK: (1) 5-9-002:026 (Seaward), DLNR File No. OA-21-3 (the “**Contested Case**”); and

WHEREAS, Dawn N.S. Chang was appointed hearing officer and the Contested Case was scheduled to convene on May 17, 2022; and

WHEREAS, the Parties now desire to resolve the Contested Case by mutual agreement, pursuant to the terms and agreements set forth below; and

WHEREAS, the Board has the authority to carry out the foregoing terms pursuant to Hawaii Revised Statutes (“**HRS**”) §§ 91-9(e), 171-3(a), 183C-3, and 183C-7.

NOW THEREFORE, in consideration of the mutual promises contained herein, the Parties have agreed and do hereby agree as follows:

A. CONSIDERATION. The consideration for this settlement is the mutual promises contained herein which the Parties agree is mutual, adequate, and fair.

B. SETTLEMENT TERMS

1. Removal of shoreline structures. The Petitioners shall remove the Seawall and all other unpermitted shoreline protection devices (e.g. any sand bags, sand “burritos”, and sand blankets) by December 31, 2023. Petitioners should remove the wall before the fall/winter 2023 swells make removal impractical. However, if circumstances outside of the Petitioners’ control make it impossible to remove the Seawall or any unpermitted shoreline protection devices by December 31, 2023 (i.e. logistical issues outside of the Petitioners’ control, weather conditions, established inability to secure a contractor to perform the work notwithstanding documented efforts), then the Petitioners may petition the Board for additional time. The Petitioners acknowledge that any additional time to remove the Seawall and/or any other device past December 31, 2023 will require Board approval. Failure to remove the Seawall by

December 31, 2023 absent Board approval will lead to further enforcement actions and fines.

The following is required in connection with the removal of the Seawall:

(a) By December 31, 2022, the Petitioners shall submit a Removal and Demolition plan that shall contain: the equipment to be used, the staging area, an inventory of materials in the applicable structure(s), the materials to be disposed and disposal location, authorizations that may be required, and documentation of the removal and disposal activities that will be submitted to the Department.

(b) By March 31, 2023, the Petitioners shall submit proof that they have retained a contractor to carry out the Removal and Demolition plan.

(c) The Petitioners shall indemnify the State of Hawai‘i (“**State**”) for any harm caused by the Seawall until the removal project is completed. If temporary erosion control structures are permitted seaward of the Petitioners’ residence (as described further below), the Petitioners shall also indemnify the State for as long as the temporary erosion control structures remain.

(d) The Petitioners shall obtain a land disposition from the O‘ahu District Land Division (i.e. a Right of Entry or a Revocable Permit), to the extent required by law for the removal project.

(e) The Petitioners shall maintain liability insurance which covers the State for a reasonable amount to be determined by the Department. This liability insurance may also be required for any land disposition, so the same insurance may satisfy both requirements.

(f) The Petitioners shall submit a long-term plan or solution for erosion management within one hundred and eighty (180) days of the removal of the Seawall. Note that if the Petitioners’ long-term plan involves the use of State lands, Hawai‘i statutes and

administrative rules require obtaining a Conservation District Use Permit and the acceptance of an environmental assessment.

2. Payment of Fines. Petitioners shall be jointly and severally liable to OCCL for the payment of \$30,000.00 in fines and not as damages, which will become payable in full on the deadline for the removal of the Seawall and all other unpermitted shoreline protection devices (i.e. on December 31, 2023, unless a further deadline is approved by the Board). However, if (1) the Seawall and all other unpermitted shoreline protection devices are removed by December 31, 2023 or by a further deadline approved by the Board, and (2) Petitioners submit proof of payment for the costs of removal, then the costs of removal will be credited against the full \$30,000.00 fine. In other words, Petitioners may offset the entire \$30,000.00 fine with the removal costs if they provide proof that they have paid \$30,000.00 or more towards removal. On the other hand, the Petitioners shall receive no credit for their removal costs, and the entire \$30,000.00 in fines will become immediately due and payable, if the Seawall and all other unpermitted shoreline protection devices are not removed by December 31, 2023 or a further deadline approved by the Board.

3. Application for Temporary Erosion Control Structures. The Petitioners may apply for a permit to install a sufficient number of temporary erosion control structures to cover/protect the entire stretch of Property facing the ocean (or in other words no less protected space than that which was protected by the Seawall). Pursuant to Hawai'i Administrative Rules (“HAR”) § 13-5-35, the Chairperson of the Board or the Deputy Director of the Department will issue the permit upon OCCL's processing of a satisfactory application for such structures and OCCL's recommendation to the Chairperson or Deputy Director for approval. Petitioners are recommended to submit their emergency permit application to OCCL by July 31, 2022 or earlier.

A completed permit application will not be unreasonably denied and OCCL will provide its recommendation in favor of issuance of the permit to the Chairperson of the Board or the Deputy Director of the Department upon OCCL's processing of a satisfactory completed application as discussed herein.

A requirement of the emergency permits will be that the Petitioners obtain a land disposition from the O'ahu District Land Division, to the extent required by law for the project, before installation of the temporary erosion control structures. If Petitioners' application for a land disposition is satisfactory and the Petitioners have obtained an emergency permit, OCCL will recommend that the O'ahu District Land Division issue the land disposition. A satisfactory completed land disposition application will not be unreasonably denied. Petitioners are recommended to obtain any required land disposition by March 31, 2023 or earlier.

The permit will begin to run from the date the Seawall is removed, as long as the Seawall is removed by December 31, 2023, or a further deadline approved by the Board. The Petitioners will submit proof of removal to OCCL. The maximum amount of time that such temporary erosion control structures will be authorized to be installed is one year. Prior to the end of the one year, if the Petitioners would like to keep the temporary structures longer, a written request to the Department together with an environmental assessment that evaluates the effect of the temporary erosion control structure must be submitted for review and approval by the Board. Hawai'i statutes and administrative rules will also require a Conservation District Use Permit for the use of State lands.

4. No Unauthorized Work on the Seawall. Any work that is done to the Seawall without prior authorization from the Department or the Board shall be a breach of this Agreement and shall be grounds for further enforcement actions and penalties.

5. Global Settlement. This Agreement constitutes a global settlement between OCCL and the Petitioners as to all enforcement actions that OCCL has brought or could have brought against Petitioners in connection with the Property and/or the Seawall to date. This release shall not apply to any obligations arising under this Agreement, any asserted breach of this Agreement, or any future violations.

6. Closing the Contested Case. This Agreement shall fully and completely resolve the Contested Case, which shall be dismissed by stipulation of the Parties and the approval of the Board pursuant to HRS § 91-9(e). As the Contested Case is being resolved by settlement and stipulation, no factual findings or conclusions of law will be issued in connection with the Contested Case.

7. Recording in the Bureau of Conveyances. This Agreement shall be recorded in the Bureau of Conveyances.

C. REMEDIES FOR BREACH. If the Petitioners breach this Agreement (by, among other things, failing to remove the Seawall or unpermitted shoreline protection devices in the timeframe provided herein and absent any potential extensions as allowed for herein, performing work on the Seawall without authorization, or failing to pay any fines which become due and are not otherwise offset by the cost of removal of the Seawall), the matter will be turned over to the State of Hawai'i, Department of the Attorney General, for disposition. On behalf of OCCL, the Department of the Attorney General may seek all remedies allowed by law, including specific performance of this Agreement and/or damages for failure to perform, in the Circuit Court of the First Circuit, State of Hawai'i.

D. LEGAL FEES AND COSTS. The Parties are to bear their own legal fees and costs incurred in connection with this Agreement.

E. GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Hawai'i. The Parties hereby agree that all actions or proceedings in any way, manner or respect, arising out of or from or related to this Agreement may be litigated in state courts, as allowed by law. Should any provision of this Agreement require interpretation, it is agreed that the party interpreting or considering same shall not apply the presumption that the term hereof shall be more strictly construed against a party by reason of the rule or conclusion that a document should be construed more strictly against the party who itself or through its agent prepared the same. It is agreed and stipulated that all parties hereto have participated equally in the preparation of this Agreement and that legal counsel was consulted by each party before the execution of this Agreement.

F. SEVERABILITY OF PROVISIONS. If any provision of this Agreement is declared invalid or unenforceable, the remaining portions of the Agreement shall not be affected thereby and shall be fully enforced.

G. SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon and shall inure to the benefit of each of the Parties hereto and their respective successors and permitted assigns.

H. SECTION HEADINGS. The section headings in this Agreement are inserted only as a matter of convenience and for reference and in no way limit the scope or intent of any provision of the Agreement.

I. COUNTERPARTS. The Parties agree that this Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, and said counterparts shall together constitute one and the same instrument, binding all the Parties thereto, notwithstanding that all the Parties are not signatories to the original or the same counterpart.

J. ENTIRE AGREEMENT. This Agreement contains the entire Agreement between the Parties with respect to the settlement of the Contested Case. This Agreement supersedes and replaces any and all prior or contemporaneous agreements or understandings, written or oral, with regard to the disposition of the Contested Case.

K. MODIFICATION PROVISION. This Agreement may only be modified by a writing executed by the Parties.

L. DUE AUTHORITY. The Parties warrant and represent that they have read this Agreement, understand it, have consulted with their respective counsel regarding its legal effect, and have all necessary authority to execute and deliver this Agreement.

[SIGNATURE PAGES FOLLOW]

AGREED AND ACCEPTED:

SEAMAIDS LLC	Date	LIAM McNAMARA	Date
By: _____			
Title: _____			

BRANDEE MCNAMARA	Date
------------------	------

APPROVED AS TO FORM:



EDMUND K. SAFFERY, ESQ.
FOREST B. JENKINS, ESQ.
Attorneys for Seamaids LLC, Liam McNamara, and Brandee McNamara

AGREED AND ACCEPTED:



Jul 29, 2022

OFFICE OF CONSERVATION AND COASTAL LANDS, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I	Date
By: Robert K. Masuda	
Title: Deputy Director, Department of Land and Natural Resources	

APPROVED AS TO FORM:



LINDA L.W. CHOW, ESQ.
LAUREN K. CHUN, ESQ.
Deputy Attorneys General, Attorneys for the Office of Conservation and Coastal Lands,
Department of Land and Natural Resources, State of Hawai'i


[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

APPROVED AS TO FORM:

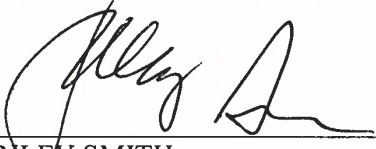


COLIN L. LAU, ESQ.
Deputy Attorney General, Attorney for the Board of Land and Natural Resources, State of
Hawai'i

**APPROVED AND SO ORDERED BY THE BOARD OF LAND AND NATURAL
RESOURCES:**




SUZANNE D. CASE
Date 8/26/22
Chairperson
Board of Land and Natural Resources



RILEY SMITH
Date 8/26/22
Member



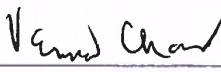
DOREEN NĀPUA CANTO
Date 8/26/22
Member



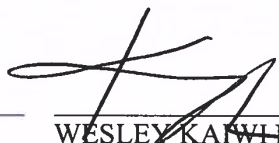
KAREN ONO
Date 8/26/22
Member



AIMEE KELI'I BARNES
Date
Member




VERNON CHAR
Date 8/26/22
Member



WESLEY KAIWINUIYOON
Date 8/26/22
Member


In the Matter of a Contested Case Regarding Enforcement Action OA-21-03 for the Alleged Construction of an Unauthorized Erosion Control Structure Located along the Coastline within the Conservation District by Liam McNamara and Brandee McNamara/Seamaids LLC at 59-175C Ke Nui Road, Paumalū, O'ahu TMK: (1) 5-9-002:026 (Seaward), DLNR File No. OA-21-3; SETTLEMENT AGREEMENT

APPROVED AS TO FORM:




COLIN LAU, ESQ.
Deputy Attorney General, Attorney for the Board of Land and Natural Resources, State of
Hawai'i

**APPROVED AND SO ORDERED BY THE BOARD OF LAND AND NATURAL
RESOURCES:**




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



RILEY SMITH
Date 8/26/22
Member



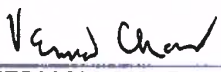
DOREEN NĀPUA CANTO
Date 8/26/22
Member




KAREN ONO
Date 8/26/22
Member



AIMEE KELI'I BARNES
Date Aug 26, 2022
Member



VERNON CHAR
Date
Member



WESLEY KAIWINUIYOON
Date
Member

In the Matter of a Contested Case Regarding Enforcement Action OA-21-03 for the Alleged Construction of an Unauthorized Erosion Control Structure Located along the Coastline within the Conservation District by Liam McNamara and Brandee McNamara/Seamaids LLC at 59-175C Ke Nui Road, Paumaliū, O'ahu TMK: (1) 5-9-002:026 (Seaward), DLNR File No. OA-21-3; SETTLEMENT AGREEMENT

EXHIBIT B

HOLLY T. SHIKADA 4017
Attorney General of Hawai'i

LINDA L.W. CHOW 4756
LAUREN K. CHUN 10196
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
Room 300, Kekuanao'a Building
465 South King Street
Honolulu, Hawai'i 96813
Telephone: (808) 587-2992

Attorneys for THE OFFICE OF CONSERVATION AND COASTAL LANDS, DEPARTMENT
OF LAND AND NATURAL RESOURCES, STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER of a Contested Case) DLNR File No. OA-21-3
Regarding Enforcement Action OA-21-03 for)
the Alleged Construction of an Unauthorized) **STIPULATION TO DISMISS PETITION**
Erosion Control Structure Located along the) **AND TERMINATE CONTESTED CASE**
Coastline within the Conservation District by)
Liam McNamara and Brandee)
McNamara/Seamaids LLC at 59-175C Ke Nui) Hearings Officer: Dawn N.S. Chang, Esq.
Road, Paumalū, O'ahu TMK: (1) 5-9-002:026) Contested Case Hearing Date: May 16, 2022
(Seaward))
_____)

STIPULATION TO DISMISS PETITION AND TERMINATE CONTESTED CASE

Pursuant to Hawai'i Revised Statutes § 91-9(e), IT IS HEREBY STIPULATED AND
AGREED by and between Petitioners SEAMAIDS LLC, LIAM MCNAMARA, and BRANDEE
MCNAMAR (“**Petitioners**”), and the OFFICE OF CONSERVATION AND COASTAL
LANDS of the DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF
HAWAII (“**OCCL**”), by and through their undersigned attorneys, that Petitioners’ January 29,
2021 Petitions are hereby withdrawn and dismissed, with prejudice, and this case is hereby

terminated and closed, as indicated by the signatures below, because the Parties have reached a settlement agreement which is entered concurrently herewith.

DATED: Honolulu, Hawaii, August 26, 2022

~~DMUNDK. SAFFERY, ESQ.~~
FOREST B. JENKINS, ESQ.
Attorneys for Seamajds LLC, Liam McNamara, and Brandee McNamara



LINDA L.W. CHOW, ESQ.
LAUREN K. CHUN, ESQ.
Deputy Attorneys General, Attorneys for the Office of Conservation and Coastal Lands,
Department of Land and Natural Resources, State of Hawai'i

APPROVED AS TO FORM:



COLIN J. LAU, ESQ.
Deputy Attorney General, Attorney for the Board of Land and Natural Resources, State of
Hawai'i

APPROVED AND SO ORDERED:



SUZANNE D. CASE
Presiding Officer and Chairperson of the Board of Land and Natural Resources

In the Matter of a Contested Case Regarding Enforcement Action OA-21-03 for the Alleged Construction of an Unauthorized Erosion Control Structure Located along the Coastline within the Conservation District by Liam McNamara and Brandee McNamara/Seamajds LLC at 59-175C Ke Nui Road, Paumalu, O'ahu TMK: (1) 5-9-002:026 (Seaward), DLNR File No. OA-21-3; STIPULATION TO DISMISS PETITION AND TERMINATE CONTESTED CASE



7/28/2020 OCCL Photo of Collapsed Seawall in Shoreline Area Fronting the Subject Parcel



1/31/2022 OCCL Photo of Collapsed Seawall and other Unpermitted Shoreline Protection Devices in Shoreline Area Fronting the Subject Parcel



1/31/2022 OCCL Photo of Collapsed Seawall and other Unpermitted Shoreline Protection Devices in Shoreline Area Fronting the Subject Parcel



9/7/2022 OCCL Photo of Collapsed Seawall and other Unpermitted Shoreline Protection Devices in Shoreline Area Fronting the Subject Parcel



10/2/2023 OCCL Photo Showing Approximate Area of Proposed Temporary Erosion Control Structure in the Shoreline Area Fronting the Subject Parcel



