

**State of Hawai'i
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
Honolulu, Hawai'i**

January 12, 2024

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

Regarding: Appointment and selection of a Hearing Officer to conduct all hearings for Contested Case OA 24-2 regarding Conservation District Enforcement File OA 23-13 and rescind Board's prior action of December 7, 2023, Item K-5 for construction of a shoreline erosion control device located makai of 59-147 A Ke Nui Road, Tax Map Key: (1) 5-9-002:002, and Makai of 59-147 Ke Nui Road, Tax Map Key: (1) 5-9-002:003

Exhibit: Petition for a Contested Case

Background

On December 7, 2023, the Board of Land and Natural Resources (Board) found Mr. Joshua H. VanEmmerik in violation of Hawaii Revised Statutes (HRS) §§183C-7 and 171-6(12) and Hawaii Administrative Rules (HAR) §13-5-24 for alleged construction of a shoreline erosion control device located makai of 59-147 A Ke Nui Road, Tax Map Key (TMK): (1) 5-9-002:003 subject to the following:

1. Mr. VanEmmerik is fined \$15,000 for violating the provisions of HAR §13-5-24, for digging a trench, laying geotextile tubes in the trench, mining sand from the beach to fill the tubes, and covering the area with beach sand and a geotextile cloth (ENF: OA 23-13) on land within the Conservation District Resource Subzone;
2. Mr. VanEmmerik is fined a total of \$30,000 for two days (October 28, 2023, and November 5, 2023) of willful violation of this chapter after having received notification from the Department to stop all work;
3. Mr. VanEmmerik is fined \$1,000 per day for his failure to remove the encroachments upon public lands, accrual of such starting when he received notice on November 6, 2023, and therefore total \$32,000;
4. Mr. VanEmmerik shall pay all designated fines of \$77,000 within ninety (90) days from the date of the Board's action;
5. That Mr. VanEmmerik or future owner shall remove all unauthorized erosion control materials and encroachments by September 1, 2024;
6. That Mr. VanEmmerik shall restore the subject area to a more natural state and the Department's satisfaction by September 1, 2024;

Item K-5

7. That Mr. VanEmmerik or future owner shall remove or relocate the portions of the dwellings that are makai of the shoreline by September 1, 2024;
8. That in the event Mr. VanEmmerik or future owner fails to restore the subject area to a more natural state and the Department's satisfaction by September 1, 2024, then Mr. VanEmmerik shall be liable for all costs of removal incurred by the State or local government(s);
9. That in the event of failure of Mr. VanEmmerik or future owner to comply with any order imposed in connection with this enforcement action, Mr. VanEmmerik shall be fined an additional \$16,000 per day, pursuant to HRS §§ 171-6(12) and 183C-7, until the order is complied with; and
10. That in the event of failure of Mr. VanEmmerik to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs.

After the Board rendered their decision on the matter, Ms. Jacquelyne VanEmmerik orally requested a contested case on behalf of her brother, Mr. Joshua H. VanEmmerik. The oral request was made prior to the closing of the Board Meeting on December 15, 2023.

On December 26, 2023, the Department received a written petition from Mr. Joshua H. VanEmmerik contesting the Board's findings. **(Exhibit 1)**

Hearings of violations

HAR §13-1-31.1, provides when a violation is alleged for which an administrative remedy is provided, the alleged violator is entitled to a contested case hearing and no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings.

Authority for designating Hearing Officers

HAR §13-1-32 (b), provides that the Board may conduct the contested case hearing, or at its discretion, may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.

Additionally, HRS §§92-16 and 171-6, also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Rescinding prior Board decision

The contested case hearing will result in a new Decision and Order. Rescinding the prior decision takes away any possible claim that the Board has tainted the hearing officer's judgment by its decision.

Discussion

As the oral request was followed by a written petition and this is an enforcement matter, staff recommends that the Board's prior action of December 7, 2023 regarding agenda Item K-5 be rescinded, and a contested case be granted to Mr. VanEmmerik.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. At the conclusion of the contested case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Staff Recommendation

Staff recommends that the Board find:

1. That Mr. Joshua H. VanEmmerik is entitled to a contested case hearing;
2. That the Board's prior action of December 7, 2023, regarding agenda Item K-5 for Alleged Construction of a Shoreline Erosion Control Device Located Makai of 59-147 A Ke Nui Road, Tax Map Key: (1) 5-9-002:002, and Makai of 59-147 Ke Nui Road, Tax Map Key: (1) 5-9-002:003 be rescinded;
3. That no person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings; and
4. That the Board authorize the appointment of a Hearing Officer and delegate authority for the selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



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

MC



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING **2023 DEC 26 A 10:15**

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

RECEIVED
 2023 DEC 22 PM 12:5
 DEPT. OF LAND &
 NATURAL RESOURCES
 STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name JOSHUA VANEMMERIK	2. JOSHUA VANEMMERIK	
3. [REDACTED]	4. KAILUA	5. HI 96734
6. [REDACTED]	7. [REDACTED]	8. Fax

B. ATTORNEY (if represented)

9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER		
17. Board Action Being Contested "\$77,000 FINE FOR ALLEGED EROSION MATERIAL IN CONSERVATION DISTRICT"		
18. Board Action Date 12/15/23	19. Item No. K-5	
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case PETITIONER IS ENTITLED TO A CONTESTED CASE UNDER HAWAII REVISED STATUTE SEC. 13-1-28, AS A PUBLIC HEARING HAS BEEN HELD AND HE HAS COMPLIED WITH THE REQUIREMENTS SET OUT IN HAWAII REVISED STATUTE SECTION 13-1-29.		
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection PETITIONER IS PERMITTED A CONTESTED CASE UNDER HAWAII REVISED STATUTE SEC 13-1-128, AS A PUBLIC HEARING HAS BEEN HELD AND HE HAS COMPLIED WITH THE REQUIREMENTS SET OUT IN HAWAII REVISED STATUTE SECTION 13-1.		
22. Any Disagreement Petitioner May Have with an Application before the Board YES. PETITIONER DISAGREES WITH THE BOARD'S DECISION TO DENY HIS EMERGENCY PERMIT AND TO IMPLEMENT A TEMPORARY SAND BURRITO FRONTING THE PROPERTY, AS HE BELIEVES SUCH PERMIT IS ESSENTIAL TO MAINTAINING PUBLIC SAFETY AS HE CONTINUES TO INVESTIGATE AND ADDRESS ANY ISSUES ON HIS PROPERTY. (SEE ATTACHED)		
23. Any Relief Petitioner Seeks or Deems Itself Entitled to YES. PETITIONER SEEKS RELIEF FROM THE \$77,000.00 FINE IMPOSED BY THE BOARD OF LAND AND NATURAL RESOURCES ON OR BETWEEN DEC. 7, 2023 AND DEC. 15, 2023.		

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

PETITIONERS PARTICIPATION IN THE PROCEEDING WOULD SERVE THE PUBLIC INTEREST BECAUSE 1) THE PUBLIC HAS AN INTEREST IN ENSURING ITS CITIZENS' DUE PROCESS RIGHTS ARE HONORED BY WAY OF (A) REQUIRING THE STATE TO PROVIDE SUCH CITIZENS THE RIGHT TO BE HEARD WHEN THEIR LIFE, LIBERTY, OR PROPERTY IS AT RISK OF BEING DEPRIVED BY THE STATE; AND (B) REQUIRING THE STATE TO PRODUCE SUFFICIENT EVIDENCE WHEN IT SEEKS TO DEPRIVE ITS CITIZENS OF THEIR LIFE, LIBERTY OR PROPERTY; AND (2) PETITIONER'S PARTICIPATION IN THE PROCEEDING ENSURES THE SAME.

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

PETITIONER MEETS THE CRITERIA UNDER HAWAII REVISED STATUTE SECTION 13-1-31(C) BECAUSE HE HAS A SUBSTANTIAL INTEREST IN THE MATTER. PETITIONER HAS SUBSTANTIAL INTEREST IN THE MATTER BECAUSE HE IS THE INDIVIDUAL PERSON AGAINST WHOM THE BOARD OF LAND AND NATURAL RESOURCES HAS IMPOSED A FINE.

(CHECK) Check this box if Petitioner is submitting supporting documents with this form.

(CHECK) Check this box if Petitioner will submit additional supporting documents after filing this form.

<u>JOSHUA VANEMMERIK</u>	<u><i>Joshua VanEmmerik</i></u>	<u>12/21/23</u>
Petitioner or Representative (Print Name)	Signature	Date



Cain, Michael

October 7, 2023 at 9:47 AM

FW: [EXTERNAL] TMK (1) 5-9-002: 002 & 003 (59-147 & 147A Ke Nui Road) Emergency CDUA Permit Application

To: Dennis Poma, Cc: Takeuchi Apuna, Dawn, Krueger, Elizabeth S, Shoji, Joyce M., [REDACTED] & 2 more [Details](#)



Dear Mr. Poma,

The Department of Land and Natural Resources has received your email regarding the potentially dangerous situation at 59-147 and 29-147A Ke Nui Road and your request for emergency permit to protect their property. We are unable to authorize the proposed placement of shoreline hardening materials on State land.

Please advise the landowner to take immediate action to relocate any tenants in the buildings and protect the public beach.

We strongly advise you to relocate the two residences away from the eroding shoreline as soon as possible. We will forward your communication to the County Department of Planning and Permitting so that they are aware of the situation and that you may be contacting them.

We iterate, please protect the safety of any tenants by evacuating them immediately and protect the public beach from debris that may cause harm to the public.

Sincerely,
Michael Cain

Copy
County Department of Planning and Permitting
Joshua Van Emmerik, landowner
Forest Jenkins, counsel for landowner
Mark Ticonni, contractor on application

Chair, Board of Land and Natural Resources
DLNR Division of Conservation and Resource Enforcement