

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

April 26, 2024

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Approval of Petition for Contested Case Hearing by Anthony Hodgson and 2G Vessel Owner Limited Regarding Enforcement Action Against Anthony Hodgson and 2G Vessel Owner Limited for Unlawful Damage to Stony Coral and Live Rock Resulting from the September 29-30, 2021 *Endless Summer* Anchoring Incident within the Kailua Bay Fisheries Management Area, Island of Hawaii

SUMMARY

Petitioners Anthony Hodgson (“Hodgson”) and 2G Vessel Owner Limited (“2G Limited”) requested a Contested Case Hearing (“CCH”) challenging the enforcement action against Hodgson and 2G Limited for stony coral and live rock damage resulting from the September 29-30, 2021 *Endless Summer* anchoring incident that occurred within the Kailua Bay Fisheries Management Area, Island of Hawaii, which was scheduled to be considered by the Board of Land and Natural Resources (“Board”) at its December 8, 2022 Board Meeting. We find that Hodgson and 2G Limited are entitled to a CCH and recommend that the Board grant the petition.

BACKGROUND

From the afternoon of September 29, 2021 through the morning of September 30, 2021, a large yacht named *Endless Summer* was anchored in Kailua Bay on the island of Hawaii. Upon receiving reports of extensive coral damage in the vicinity of the *Endless Summer’s* anchor and chain, staff members from the Division of Aquatic Resources [“DAR”] and the Division of Boating and Ocean Recreation [“DOBOR”], along with an officer from the Division of Conservation and Resources Enforcement [“DOCARE”], visited the site to speak with the captain of the yacht and inspect for any damage to the underlying reef. DAR divers observed *Endless Summer’s* anchor chain causing extensive damage to the reef. When the captain and crew were informed of the situation, *Endless Summer* immediately pulled anchor and moved to deeper water to reduce the likelihood of further damage to the reef.

On October 1, 2021, DAR staff members returned to the anchorage site to conduct a full assessment of the damage to the reef. Coral and live rock damage was surveyed systematically using transect tape, photographs, 50cm scale bars, sketches, and a

visual census. The DAR team documented extensive damage to the reef, including 578 coral colonies and two specimens of live rock.

An enforcement action against Hodgson and 2G Limited was placed on the agenda for the December 8, 2022, meeting of the Board of Land and Natural Resources (“Board”). [<https://dlnr.hawaii.gov/wp-content/uploads/2022/12/F-3.pdf>] At this meeting, DAR sought a fine of **\$261,281.37** against Hodgson and 2G Limited for violations of Hawaii Administrative Rules (“HAR”) §§ 13-95-70 and 71 (unlawful damage of stony coral and live rock). Prior to the matter being heard at the December 8, 2022 Board meeting, Hodgson and 2G Limited’s attorney, Lisa Bail, orally requested a contested case hearing before the Board. This oral request was followed by a written petition for a contested case hearing on December 19, 2022 (see **Exhibits 1 and 2**). As a result, there was no discussion on this case at this meeting.

DISCUSSION

A contested case hearing is required if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if a hearing is mandated by due process. *Bush v. Hawaiian Homes Com’n*, 76 Hawai’i 128, 134, 870 P.2d 1272, 1278 (1994). Thus, a particular petitioner is entitled to a contested case hearing if so stated in a statute or rule or if the petitioner has a property interest entitled to due process protection. In order to obtain a contested case hearing, a petitioner must also follow specific procedures for making the request in order to be entitled to a contested case hearing. *Hui Kako’o Aina Ho’opulapula v. Bd of Land & Nat. Res.*, 112 Hawai’i 28, 39–41, 143 P.3d 1230, 1241–43 (2006). Those procedures are contained in HAR § 13-1-29.

A. Statutes and Rules Do Not Require a Hearing

The statutes and rules in this case do not require a contested case hearing to be held. Hodgson was cited for violations of HAR §§ 13-95-70 and 13-95-71. Authorization to assess fines against Hodgson for these violations is contained in HRS § 187-12.5. See HAR § 13-95-2. Neither the rules nor the statute require the Board to hold a contested case hearing in connection with the violations penalized under HRS § 187-12.5, and Hodgson and 2G Limited have not cited to a statute or rule which requires the Board to hold a hearing.

B. Due Process Requires a Hearing

A petitioner must possess an interest which rises to the level of “property” in order to assert a right to procedural due process. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972); *accord Sandy Beach Defense Fund v. City Council of City & Cnty. of Honolulu*, 70 Hawai’i 361, 377, 773 P.2d 250, 260 (1989).

At the outset, a claim of a due process right to a hearing requires a two[-]

step analysis: (1) is the particular interest which the claimant seeks to protect by a hearing “property” within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is “property” what specific procedures are required to protect it.

Brown v. Thompson, 91 Hawai‘i 1, 10, 979 P.2d 586, 595 (1999) (citations omitted).

Courts have held that parties have a property interest in their money. *Zilba v. City of Port Clinton*, 924 F. Supp. 2d 867, 877 (N.D. Ohio Feb. 15, 2013) (“No doubt, Plaintiff has a property interest in his money.” (citing other sources)). Hodgson and 2G Limited are subject to a monetary fine if found liable by the Board. Hodgson and 2G Limited’s potential liability create a sufficient property interest to trigger due process.

C. Hodgson and 2G Limited Have Substantially Complied with Procedural Requirements

The Hawaii Administrative Rules require that a person requesting a contested case hearing by the Board must make an oral or written request for a contested case hearing by the close of the Board meeting at which the subject matter of the request is scheduled for Board disposition. HAR § 13-1-29(a). The initial request must be followed by the filing of a written petition no later than ten calendar days after the close of the Board meeting at which the matter was scheduled for disposition. *Id.* For good cause, the time for making the oral or written request or submitting a written petition, or both, may be waived. *Id.*

Hodgson properly followed the requirements contained in HAR § 13-1-29 in timely requesting a contested case hearing in orally prior to the close of the December 8-9, 2022 Board meeting at which the enforcement action against him was scheduled to be heard. Hodgson filed a written petition on December 19, 2022.

CONCLUSION

The Board is required to provide a contested case hearing to petitioners Anthony Hodgson and 2G Vessel Owner Limited.

RECOMMENDATIONS:

1. That the Board approve the Petition for Contested Case Hearing by Anthony Hodgson and 2G Vessel Owner Limited; and
2. That the Board authorize the Chairperson to appoint a hearing officer to preside over the hearing.

Respectfully submitted,



Brian J. Neilson
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson
Board of Land and Natural Resources

Attachments:

- Exhibit 1** – Petition for Contested Case Hearing – Anthony Hodgson
- Exhibit 2** – Petition for Contested Case Hearing – 2G Vessel Owner Limited

Item F-4, Exhibit 1



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

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

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
 2022 DEC 19 AM 11:23
 DEPARTMENT OF LAND & NATURAL RESOURCES
 STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Anthony Hodgson	2. Contact Person Lisa A. Bail	
3. Address c/o Lisa A. Bail, 999 Bishop Street, Suite 1600	4. City Honolulu	5. State and ZIP HI, 96813
6. Email lbail@goodsill.com	7. Phone 808-547-5787	8. Fax 808-441-1202

B. ATTORNEY (if represented)		
9. Attorney Name Lisa A. Bail	10. Firm Name Goodsill, Anderson, Quinn & Stifel LLP	
11. Address 999 Bishop Street, Suite 1600	12. City Honolulu	13. State and ZIP HI, 96813
14. Email lbail@goodsill.com	15. Phone 808-547-5787	16. Fax 808-441-1202

C. SUBJECT MATTER

17. Board Action Being Contested Enforcement Action against Anthony Hodgson and 2G Vessel Owner Limited for Alleged Stony Coral and Live Rock Damage Resulting from the September 29-30, 2021, Endless Summer Anchoring Incident within the Kailua Bay Fisheries Management Area, Island of Hawaii	
18. Board Action Date December 9, 2022	19. Item No. F-3
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case Pursuant to HAR § 13-1-31.1, when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator. In this case, constitutional due process entitles the alleged violator to a contested case hearing.	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection As set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, in this Enforcement Action, the Division of Aquatic Resources ("DAR") has recommended that the Board of Land and Natural Resources ("BLNR") issue a fine to Anthony Hodgson and 2G Vessel Owner Limited.	
22. Any Disagreement Petitioner May Have with an Application before the Board For the reasons set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, DAR's recommendation failed to account for several pertinent factors. Petitioner reserves the right to identify additional disagreement or request additional relief at the time the contested case hearing is held	
23. Any Relief Petitioner Seeks or Deems Itself Entitled to For the reasons set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, Petitioner respectfully requests that BLNR modify the recommendation of DAR by eliminating or substantially reducing the recommended fine. Petitioner reserves the right to identify additional disagreement or request additional relief at the time the contested case hearing is held.	
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest As set forth in the testimony of Lisa A. Bail attached as Exhibit A to the Petition, Petitioner will provide BLNR with additional information about the alleged violation that demonstrates that Petitioner lacked culpable intent.	
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	

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

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

Lisa A. Bail
Petitioner or Representative (Print Name)


Signature

12/19/2022
Date

EXHIBIT A



GOODSILL

Lisa A. Bail
lbail@goodsill.com | (808) 547-5787

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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December 6, 2022
Page 2

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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Page 3

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



Lisa A. Bail

LAB

Attached Exhibit A

EXHIBIT A

Search: Recognize Text

Export PDF

Adobe Export PDF
Convert PDF Files to Word or Excel Online
Select PDF File
US Coast Pilot - Islands.pdf

Convert to
Microsoft Word (.docx)
Document Language: English (U.S.) Change

Convert

Edit PDF
Create PDF
Comment
Combine Files
Organize Pages
Compress PDF
Redact
Prepare Form

Convert, edit and e-sign PDF forms & agreements

Free 7-day Trial

UNITED STATES Coast Pilot[®] 10



Oregon, Washington,
Hawaii and Pacific Islands

(269)

ENC - US5HA17M
Chart - 19331

(270) **Kailua Bay**, 50 miles northwest of Kalahe, is a dent in the coast at the south end of the flat plain that extends north to Kawahae 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 Kawahae 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) **Kauiwi 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 Kauiwi 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 Kalahe, 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 1,000 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 **Kauiwi 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 **Mahaima** 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.

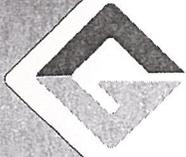
(284) **Kapalaea** is a village on the south side of a small bight 3.5 miles northeast of **Kiholo**. The bight is foul and can only be used by small boats with local knowledge.

(285)

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

(286) **Paako Bay** is a small indentation in the coast 30 miles northeast of **Keahole Point**. There is no protection for large vessels, and very little is available for small





GOODSILL

Lisa A. Bail
lbail@goodsill.com | (808) 547-5787

December 7, 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: Supplemental 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 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

LAB

Item F-4, Exhibit 2



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

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

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
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- All materials, including this form, shall be submitted in **three (3)** photocopies.

RECEIVED
 2022 DEC 19 AM 11:29
 DEPT. OF LAND & NATURAL RESOURCES
 1151 PUNCHBOWL STREET
 HONOLULU, HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name 2G Vessel Owner Limited	2. Contact Person Lisa A. Bail	
3. Address c/o Lisa A. Bail, 999 Bishop Street, Suite 1600	4. City Honolulu	5. State and ZIP HI, 96813
6. Email lbail@goodsill.com	7. Phone 808-547-5787	8. Fax 808-441-1202

B. ATTORNEY (if represented)		
9. Attorney Name Lisa A. Bail	10. Firm Name Goodsill, Anderson, Quinn & Stifel LLP	
11. Address 999 Bishop Street, Suite 1600	12. City Honolulu	13. State and ZIP HI, 96813
14. Email lbail@goodsill.com	15. Phone 808-547-5787	16. Fax 808-441-1202

C. SUBJECT MATTER

17. Board Action Being Contested

Enforcement Action against Anthony Hodgson and 2G Vessel Owner Limited for Alleged Stony Coral and Live Rock Damage Resulting from the September 29-30, 2021, Endless Summer Anchoring Incident within the Kailua Bay Fisheries Management Area, Island of Hawaii

18. Board Action Date

December 9, 2022

19. Item No.

F-3

20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case

Pursuant to HAR § 13-1-31.1, when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator. In this case, constitutional due process entitles the alleged violator to a contested case hearing.

21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection

As set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, in this Enforcement Action, the Division of Aquatic Resources ("DAR") has recommended that the Board of Land and Natural Resources ("BLNR") issue a fine to Anthony Hodgson and 2G Vessel Owner Limited.

22. Any Disagreement Petitioner May Have with an Application before the Board

For the reasons set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, DAR's recommendation failed to account for several pertinent factors. Petitioner reserves the right to identify additional disagreement or request additional relief at the time the contested case hearing is held

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

For the reasons set forth in the testimony of Lisa A. Bail attached as Exhibit A to this Petition, Petitioner respectfully requests that BLNR modify the recommendation of DAR by eliminating or substantially reducing the recommended fine. Petitioner reserves the right to identify additional disagreement or request additional relief at the time the contested case hearing is held.

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

As set forth in the testimony of Lisa A. Bail attached as Exhibit A to the Petition, Petitioner will provide BLNR with additional information about the alleged violation that demonstrates that Petitioner lacked culpable intent.

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

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

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

Lisa A. Bail

Petitioner or Representative (Print Name)



Signature

12/19/2022

Date

EXHIBIT A



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.

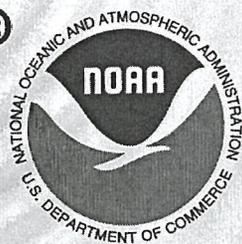
Lisa A. Bail

LAB

Attached Exhibit A

EXHIBIT A

UNITED STATES Coast Pilot[®]



10

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(269)
ENC - USSHA17M
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 Kawahae 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 - USSHA14M, US4HA14M
Chart - 19327

(274) The coast between Kailua Bay and Kawahae 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) Kapalaoa 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 - USSHA16M, USSHA14M, 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



GOODSILL

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December 7, 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: Supplemental 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 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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