

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawai'i

March 24, 2022

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

SUBJECT: Denial of Petition for Contested Case Hearing filed on January 22, 2022 by Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki, regarding the Renewal of Commercial Use Permits for Ocean Riders, Inc., Adventure Rafting, Inc., Lahaina Para-Sail, Inc., Lahaina Water Ski, Inc., Parasail Kaanapali, Inc., and West Maui Parasail, Inc., for Mala Launch Ramp, Maui; and requesting a delegation of authority to the Chairperson to grant or deny any future contested case hearing petitions regarding DOBOR's commercial use permit renewals for the fifteen authorized commercial permittees at Mala boat launch ramp.

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.

SUMMARY:

Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki (hereinafter "**Petitioners**") collectively filed a contested case hearing ("**CCH**") petition ("**Petition**") on January 22, 2022 regarding renewal of one-year, commercial ramp permits ("Permits") for use of the State-owned and -maintained, public boat ramp located off of Mala Wharf Road, in Lahaina, Maui ("**Mala Boat Ramp**"). The Department of Land and Natural Resources' ("**DLNR**") Division of Boating and Ocean Recreation ("**DOBOR**") recommends that the Board of Land and Natural Resources ("**Board**"): (1) deny the petition because Petitioners have not shown that they are entitled to a contested case hearing; (2) delegate the authority to grant or deny any future CCH petitions of this type to the Chairperson; (3) adopt the findings contained in this submittal; and (4) authorize the Chairperson to take all actions necessary to effectuate its decision,

Some documents are appended as exhibits; other, more voluminous public sources referenced in this submittal with hyperlinks are incorporated into the submittal by reference for efficiency.

I. BACKGROUND

Petitioners filed a CCH petition regarding the renewal of Permit for six commercial operators using the Mala boat launch ramp.

A. Brief history of the State’s Boating Facilities at Mala Wharf, Maui.

“Mala Wharf” is located approximately 1-mile north of Lahaina, on the West coast of Maui Island.¹ Historical accounts suggest that the wharf was erected approximately 100-years ago by the Territory of Hawaii in order to “berth large passenger steamships.”² Due to ocean conditions at the site, however, these steamships were unable to use the harbor, “and the wharf was left to be used by small recreational craft, fishing boats and small inter-island ferries.” *Id.*

The Boat Launch Ramp at Mala Wharf was constructed by the State government in 1979 at a cost of almost \$450,00.³ The stated purpose of this construction was to facilitate the “[l]aunching of commercial and recreational trailer boats” at Mala. *Id.*

When administration of the boating program and the State’s boating facilities was transferred from the State Department of Transportation to the DLNR in the early 1990s, there were apparently “22” “Commercial Permits” issued for use of the Mala Boat Ramp. *Id.*

A portion of the Mala Boat Ramp area is currently encumbered by a lease for a dry land boat and trailer storage area.⁴

¹ See R.M. Towill Corporation, *Mala Boat Ramp & Mala Wharf, Documentation of Facilities for the Boating Program Transfer to the Department of Land and Natural Resources*, pp. 28–29 (Jan. 1993) (“**RMTC Report**”), available at: <https://dlnr.hawaii.gov/dobor/files/2022/03/RMTC.pdf>.

² RMTC Report at 29. Historical, private (*i.e.*, non-governmental and unofficial) accounts also suggest that for decades after its initial construction, the harbor was also used in connection with the West Maui pineapple industry. See, e.g., Ho’okuleana LLC, *Maui No Ka Oi (Maui is the best)*, *West Maui*, pp. 24–25 (2017), available at: <https://imagesofoldhawaii.com/wp-content/uploads/West-Maui-Background-Summary.pdf>.

³ RMTC Report at 28 (noting that the original boat ramp was demolished in 1978, which cost the government over \$40,000).

⁴ See *Mala Wharf & Boat Ramp Tenants Required to Renegotiate Leases*, Department of Land & Natural Resources: News Release (Jan. 27, 2017), available at: <https://dlnr.hawaii.gov/dobor/2017/01/28/nr17-014b/>.

B. The Petition for a Contested Case Hearing (CCH petition), and the Petitioners' complaints regarding the Mala Boat Launch Ramp (but not the specific permittees whose permits they challenge).

Petitioners seek a CCH for the purpose of "[adjudicating] the rights and interests of Petitioners with respect to the issuance of new permits." See **Exhibit A** (Petition).

The Petition identifies the following concerns:

- (1) Petitioners cannot use the Mala boat launch ramp to launch their boats for traditional and customary fishing and canoe paddling, and to conduct nearshore gathering due to "excessive permitted commercial activity."
- (2) The public parking lot is full of commercial customers.
- (3) Commercial activities and unsafe sunscreens contribute to ocean pollution.

Petitioners' desired relief include: denial of Mala boat launch ramp Permit, improvements to commercial operations, increased training requirements, requiring use of reef-safe sunscreens, and limiting the number of launches or commercial customers.

These complaints mirror the issues the Board recently learned about during its meeting held on February 25, 2022.⁵ For example, Petitioners allege that they sometimes cannot use the Mala Boat Ramp to launch their boats for traditional and customary fishing and canoe paddling without waiting in line and to conduct nearshore gathering due to "excessive permitted commercial activity." When pressed, petitioners have clarified that the "long wait times" they refer to are generally fifteen-to-thirty minutes, at the most.⁶

C. The Seven Challenged Permits

All of these Permit for commercial use of Mala Boat Ramp are valid for up to one year and may be renewed as long as the permittee is current on all fees and charges owed to DOBOR, has met minimum gross receipt requirements, as defined in HAR § 13-231-61, and is not in violation of any DLNR rules or applicable laws.

⁵ The Agenda for the February 25, 2022 meeting of the Board of Land and Natural Resources is publicly available online, at: <https://dlnr.hawaii.gov/wp-content/uploads/2022/02/Agenda-220225.pdf>. Slides from DOBOR staff's PowerPoint Presentation to the Board regarding the informational Mala item (Item #J-3) are attached hereto as **Exhibit B**.

⁶ See, e.g., Audio Recording of the Board's February 25, 2022 Meeting, Part-2, at 00:00:00–02:21:25 (Item #J-3), available at: <https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-220225-2.m4a>.

The Permit details are summarized below, including the “describe[d] commercial activities (on signature page),” which are the only commercial activities that are actually, specifically authorized to occur “on the ocean waters of the State of Hawaii” under each Permit:

Permittees	Expiration Dates	Authorized “Activity”
Ocean Riders, Inc.	03.31.2022	<ul style="list-style-type: none"> • SNORKEL CHARTERS
Adventure Rafting, Inc.	03.31.2022	<ul style="list-style-type: none"> • SNORKELING • WHALE WATCHING • CHARTER FISHING
Lahaina Para-Sail, Inc.	04.30.2022	<ul style="list-style-type: none"> • PARASAILING CHARTERS • TRANSFER TO AND FROM OF PARASAILING VESSELS
Lahaina Para-Sail, Inc.	04.30.2022	<ul style="list-style-type: none"> • PARASAILING CHARTERS • TRANSFER TO AND FROM OF PARASAILING VESSELS
Lahaina Water Ski, Inc.	04.30.2022	<ul style="list-style-type: none"> • PRIVATE CHARTERS • CHARTER FISHING • SNORKELING
Parasail Kaanapali, Inc.	04.30.2022	<ul style="list-style-type: none"> • PARASAILING CHARTERS • TRANSFER TO AND FROM OF PARASAILING VESSELS
West Maui Parasail, Inc.	04.30.2022	<ul style="list-style-type: none"> • PARASAILING CHARTERS • TRANSFER TO AND FROM OF PARASAILING VESSELS

Under their terms and conditions, each permittee “agrees to abide by all applicable Federal, State, and County laws and all boating and shore water rules promulgated by the [DLNR]”; that aside from specifically authorized activities, “[a]ny other use of harbor/ramp facilities or services must be requested and approved separately”; and each permit clearly states that it “does not grant any property rights or exclusive privileges” to the permittees. The Permits also provide for strict enforcement where permittees violate the permit provisions (and/or applicable administrative rules/laws) and clearly state that the DLNR “reserves the right to impose further

restrictions” thereon.

D. Pattern of Contested Case Petitions

Additionally, staff notes that this is the fifth CCH petition of this type from the same Petitioners since July 2021:

Petition Date	Challenged Permits Permittees/ Expiration Dates	Board Mtg. (Item #)
07.27.2021	Kaanapali Beach Watercraft Rentals, Inc./ 07.31.2021 (2x) Pacific Jet Sports, Inc./ 07.31.2021	<i>Voluntarily withdrawn for untimeliness</i>
07.28.2021	Extended Horizons Inc./ 09.29.2021 Noio Charters, Inc./ 09.29.2021	10.08.2021 (#J-1)
10.06.2021	(2x) Hawaiian Rafting Adventure, Inc./ 10.31.2021 Lahaina Harbor Water Taxi Inc./ 10.31.2021 Underwater Safari, Inc./ 10.31.2021	10.22.2021 (#J-5)
11.22.2021	Adventure Rafting, Inc./ (TEMP) 12.31.2021, <i>superseded on 01.24.2022 by permit exp. 03.31.2022</i> Ocean Riders, Inc./ (TEMP) 12.31.2021, <i>superseded on 01.24.2022 by permit exp. 03.31.2022</i>	01.14.2022 (#J-1)
11.22.2021	Extended Horizons Inc./ (TEMP) 12.31.2021, <i>superseded on 11.19.2021 by permit exp. 08.31.2022</i> Noio Charters, Inc./ (TEMP) 12.31.2021, <i>superseded on 11.19.2021 by permit exp. 08.31.2022</i>	01.14.2022 (#J-1)
01.24.2022	Adventure Rafting, Inc./ 03.31.2022 Ocean Riders, Inc./ 03.31.2022 (2x) Lahaina Para-Sail, Inc./ 04.30.2022 Lahaina Water Ski Inc./ 04.30.2022 Parasail Kaanapali, Inc./ 04.30.2022 West Maui Parasail, Inc./ 04.30.2022	03.24.2022 (#J-1)

With the Petition at issue today, the Petitioners have now requested contested case hearings regarding every Commercial Use Permit issued for Mala Boat Ramp pursuant to Hawaii Administrative Rules (“**HAR**”) § 13-231-67. See **Exhibit C** (Summary of all Mala Permits)

As noted, each of the previous petitions for a CCH was denied by the Board pursuant to HAR § 13-1-29.1.⁷ Petitioners have continued to submit nearly identical petitions for each commercial operator whose Permit is due to expire next.

II. LEGAL FRAMEWORK

A. **The Rule Authorizing 15-Permits for Commercial Use of Mala Boat Ramp**

DOBOR's jurisdiction includes issuing Permits for companies and individuals wishing to operate commercially in state ocean waters.

Pursuant to section 13-231-67, HAR, the number of Mala Boat Ramp commercial permits that DOBOR may issue at any given time for is strictly limited. The rule states, in relevant part:

(a) State boat launching ramps were constructed for the primary purpose of providing access to the waters of the State for trailered boats. Therefore, commercial use permits issued for the use of state boat launching facilities shall be restricted to boats that are regularly launched and recovered from boat launching ramps and used in the course of doing business. . . . Notwithstanding the limitation of the number of commercial use permits which may be issued for launching ramps in subsections (d)(1) through (d)(23) below, the owner may apply for and may be issued a commercial use permit for the number of vessels owned and registered in furtherance of its commercial use by the business on the 1994 effective date of these rules. . . .

(b) No commercial use permits for the use of state boat launching ramps shall be issued for the purpose of embarking or disembarking passengers by small craft or lighter from a vessel moored offshore.

(c) A commercial use permit issued for the use of a state boat launching ramp shall also be valid for all other state boat ramps on the same island at which commercial activities are permitted *except those listed in subsection (d)*; provided that the permittee shall indicate which launching ramp is expected to be the location of primary use and the fees derived from three percent of gross revenues shall be paid to that account. . . .

⁷ Publicly available materials for Board meetings referenced in the above chart are *available at*, <https://dlnr.hawaii.gov/meetings/blnr-meetings-2021/> (2021 meetings) and <https://dlnr.hawaii.gov/meetings/blnr-meetings-2022/> (2022 meetings).

(d) The maximum number of commercial use permits which may be issued for the use of the following launching ramps are:

....

(5) Mala -- 15

....

(e) The maximum number of commercial use permits that may be issued for the use of any launch ramp is two (2) per business entity or sole proprietor registered to do business in the state. Notwithstanding this section, all owners of commercial use permits on the effective date of these rules may continue operations and be permitted to apply for and renew their commercial use permits subject to compliance with all other conditions set forth in this chapter until their total number is reduced by attrition or other means to the numbers in subsection (d).

Haw. Admin. R. § 13-231-67 (2014) (emphasis added).

DOBOR issues these permits directly to permittees pursuant to HAR § 13-231-67.

B. Entitlement to a Contested Case Hearing

“A contested case hearing is required by law when it is required by (1) statute; (2) administrative rule; or (3) constitutional due process.”⁸ No statute, rule, or due process required that Petitioners be given a contested case hearing.

A contested case is sometimes required where an applicable statute or rule *mandates* a hearing prior to the administrative agency’s decision-making on a particular matter.⁹

The courts have set forth a two-step analysis for determining whether a person has a *constitutional* right to a contested case hearing.¹⁰ First, the tribunal must consider

⁸ *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai‘i 114, 124, 424 P.3d 469, 479 (2018) (citing *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015)).

⁹ *Bush*, 76 Hawai‘i at 134, 870 P.2d at 1278.

¹⁰ *Flores*, 143 Hawai‘i at 125, 424 P.3d at 480 (citing *Sandy Beach Def. Fund v. Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989) [hereinafter ***Sandy Beach***]).

whether the “particular interest” the Petitioners seek to protect is, in fact, “‘property’ within the meaning of the due process clauses of the federal and state constitutions,” in other words, a benefit to which the claimant is legitimately entitled.”¹¹

Second, if the interest *is* “property,” then the tribunal must analyze “what specific procedures are required to protect it.”¹² To make this determination, courts examine and balance three factors: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.”¹³

III. DISCUSSION

The basis of Petitioners’ claims is the alleged overuse of the Mala boat launch ramp for commercial purposes.

A. Petitioners can establish no statutory- or rule-based entitlement to a contested case hearing on the specific permits they challenge.

Petitioners has not identified any section of the Hawaii Revised Statutes establishing their alleged entitlement to a contested case hearing on these Permit renewals. Accordingly, there is no *statutory* basis for the Petitioners’ due process claims.

Additionally, a contested case hearing was not required by administrative rule. As the Hawaii Supreme Court has recognized, “a few subsections in HAR Title 13 *expressly* require[] the BLNR to hold a contested case hearing in specific circumstances or entitles an aggrieved individual to a contested case hearing upon appropriate request.”¹⁴ Here, subtitle 11 of HAR Title 13 is the relevant administrative provision to the Petitioners’ claims, and it contains nothing requiring the Board to conduct a hearing of any kind prior to the renewal of a commercial use permit specifically authorized by

¹¹ *Protect & Preserve Kahoma Ahupua‘a Ass’n v. Maui Planning Comm’n*, 149 Hawai‘i 304, 312, 489 P.3d 408, 416 (2021) [hereinafter **Kahoma**] (quoting *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994)), *as amended*.

¹² *Sandy Beach*, 70 Haw. at 377, 773 P.2d at 260.

¹³ *Flores*, 142 Hawai‘i at 126–27, 424 P.3d at 481–82 (quoting *Sandy Beach*, 70 Hawai‘i at 378, 773 P.2d at 261); *accord Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁴ *See, e.g., Flores*, 143 Hawai‘i at 125, 424 P.3d at 480 (emphasis added) (citing examples in HAR §§ 13-184-11(1) (stating that “the board shall conduct a public hearing and, upon appropriate request, a contested case hearing pursuant to chapter 91,” HRS, in order to make certain determinations), and 13-300-38 (stating in sub-section (b)(2) of the rule, that “an applicant who disagrees with the [Board’s] determination has the option to request reconsideration or appeal the decision as a contested case”)).

HAR § 13-231-67 for shared use of the public Mala Boat Ramp. Thus, there is also no rule-based requirement for a contested case hearing here.

B. Due process does not require that a contested case hearing be held.

As noted above,¹⁵ “in order to assert a right to procedural due process,” a threshold requirement is that the party invoking that right “must possess an interest which qualifies as ‘property’ within the meaning of the constitution” or State laws.¹⁶

Here, the interests that Petitioners assert would be adversely affected by the Permits fall into two general categories: their right to engage in traditional and customary practices in and around Mala Wharf and their right to enjoy a clean and healthful environment. As articulated in the pending Petition, however, neither is entitled to due process protection.

1. Petitioners do not sufficiently establish a protectable property interest here.

FIRST, Petitioners claim that the issuance of up to fifteen commercial ramp permits for commercial use of Mala Boat Ramp, as prescribed by HAR § 13-231-67, unduly burdens their right to engage in native Hawaiian traditional and customary practices. Specifically, their complaints refer to long wait times to use the boat ramp; they also point to limited parking for their vehicles and trailers, which they argue delays their ability to get vessels launched into the water so that they may engage in these practices.

Traditional and customary practices are subject to reasonable regulation, as set forth art. XII, section 7 of the Hawaii Constitution.¹⁷ Here, the regulation of commercial use of the Mala Boat Launch Ramp is reasonable, and the Petitioners can demonstrate no *superior* right to occupy and use the publicly funded, state-managed Mala Boat Ramp in order to conduct their traditional and customary activities.¹⁸ Further, the potential for some delay is inherent in the nature of a shared right. And if someone else is launching a vessel, all users must wait their turn. Delays are not an “infringement” on

¹⁵ See Legal Framework set forth in Part II(B), *supra*.

¹⁶ *Sandy Beach*, 70 Haw. at 376–77, 773 P.2d at 260; *accord Kahoma*, 149 Hawai'i at 312, 489 P.3d at 416 (2021) (quoting *Pele Defense Fund*, 77 Hawai'i at 68, 881 P.2d at 1214).

¹⁷ See *generally*, *State v. Pratt*, 127 Hawai'i 206, 216, 277 P.3d 300, 310 (applying the totality of the circumstances test and finding that, notwithstanding an argument of privilege based on Pratt's spiritual connection to the area, the balance of interests weighed in favor of allowing the park to regulate Pratt's activity via permitting), *as amended on reconsideration in part* (May 29, 2012), *opinion amended on reconsideration*, 127 Hawai'i 233, 277 P.3d 327 (2012).

¹⁸ See *'Ohana v. United States*, 76 F.3d 280, 281 (9th Cir. 1996).

the right at issue here because there is no right to use the ramp without the possibility of delay. Moreover, HAR § 13-231-67(a) provides that, “[s]tate boat launching ramps were constructed for the primary purpose of providing access to the waters of the State for trailered boats.” Yet, Petitioners have not stated how the launching of a trailered vessel is a traditional and customary right.

Petitioners also argue that various land-based activities, such as overcrowded parking lots, impinge on their traditional and customary interests. Again, these inconveniences may delay the exercise of their traditional and customary rights, but they do not necessarily deny the exercise of these rights.

Finally, Petitioners have not shown that *these particular Permits*—issued to Ocean Riders, Inc., Adventure Rafting, Inc., Lahaina Para-Sail, Inc., Lahaina Water Ski, Inc., Parasail Kaanapali, Inc., and West Maui Parasail, Inc.—*actually impact* the traditional and customary rights the Petitioners claim.

The fact that the Petition at issue today is virtually identical to each of the petitions previously denied, as summarized above, strongly suggests that Petitioners, in fact, have no particularized complaints regarding specific incidents, permittees, or permittee property.

SECOND, Petitioners have failed to assert a protectable property interest in a clean and healthful environment, with respect to the particular Permits at issue here. Indeed, Petitioners do not (and cannot) point to “laws relating to environmental quality” that define their alleged right under the circumstances presented.¹⁹

Petitioners’ main claims in this regard are that customers of the Permittees may use sunscreens containing banned ingredients known to be harmful to the health of coral reefs, etc., and that the thrill-craft-type activities conducted under the Permits create a noise disturbance that scares away fish and other marine life. Petitioners do not point to any existing environmental regulations that are being violated by the permittees. For instance, there is no evidence that these commercial operators have a practice of supplying their customers with banned sunscreens. Even if the Permittees’ customers are using banned sunscreens, it is the customers that are committing the offense, not the Permittees. Any liability for such a violation lays squarely with individual customers, not with the Permittees. These and other alleged harms that Petitioners raise are not implicated by a pre-determined number of ministerial permits for temporary, non-exclusive use of this boat ramp, let alone implicated by the specific permits being challenged here.

¹⁹ *Kahoma*, 149 Hawai‘i at 312, 489 P.3d at 416 (“[A]rticle IX, section 9 [of the Hawaii Constitution] is self-executing and that the right to a clean and healthful environment is ‘defined by existing law relating to environmental quality[.]’” (quoting *In re Application of Maui Elec. Co.*, 141 Hawai‘i 249, 261, 408 P.3d 1, 13 (2017))).

The Petitioners’ complaints appear to be more directed at the administrative rule that specifically allows for a specific amount of commercial activity via the Mala Boat Ramp, rather than to the Petitioners’ *actual interests* and how they are potentially affected by *these particular permittees*. It is far too late for Petitioners to challenge the underlying rule. See Part III(C), *infra*.

2. Even if Petitioners could establish a property interest in the challenged permits, no further “process” is due.

The Permits at issue are month-to-month permits for temporary use of a state-owned and state-managed Mala Boat Ramp for up to one-year. The permits here do not propose to allow any permanent alteration of the land (or ocean), but rather they allow for the limited and reasonable commercial use of state boat ramps for the specific, pre-determined activities summarized in a table in the Background section, *supra*. Concerns such as difficulty finding parking and delays of up to 30-minutes during busy times to launch their vessels after waiting their turn.

Moreover, any link to environmental protection is attenuated. For instance, the claims related to the harmful effects of banned sunscreens are not implicated by the activity of launching and landing of vessels at the Mala Boat Ramp. Nor are their claims unique to these specific permittees. Accordingly, the private interest the Petitioners seek to protect is limited at best.

Even assuming the Petitioners have a due process property interest at stake, the risk of an erroneous deprivation of such an interest is so minimal, that a contested case hearing would not add significant value. “‘Due process not a fixed concept requiring a specific procedural course in every situation,’ and ‘calls for such procedural protections as the particular situation demands.’”²⁰ At their core, “[t]he most basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.”²¹

DOBOR has presented four prior requests to deny contested case petitions for the renewal of Mala ramp permits. See Table at Part I(D), *supra*. Petitioners were allowed to present testimony for each of those items.

On February 25, 2022, DOBOR made an informational presentation to the Board to orient the Board to the Mala ramp area, the issues being raised, and the viewpoint of

²⁰ *Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417 (2021) (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

²¹ *Matthews*, 424 U.S. at 333; *N. Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605–606 (1975). As explained above, there is no significant property interest at stake. The property interests identified by Petitioners are not having to wait up to 30-minutes before launching trailered vessels, and not having permittees transport people who are potentially wearing the wrong kind of sunscreen.

both the Petitioners and the permittees. That agenda item lasted for over two hours, and many representatives of the interested parties appeared to provide testimony. The Board members had an opportunity to question the testifiers regarding the interests being asserted in each of the petitions and associated appeals. The testifiers could not clarify the extent to which, if the Board held a contested case hearing on DOBOR’s renewals of Permits to the permittees, it “would put forth evidence and arguments materially different from that which [it has] already proffered.”²² Therefore, the risk of erroneous deprivation to any alleged property interest is so minimal *under these circumstances* that a contested case would be valueless.

Lastly, the governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in support of Staff’s recommendation that the Board reject the Petition.²³ Contested-case hearings are expensive and time-consuming endeavors for the staff of the DLNR and the Board. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested case hearings and may go into the many tens of thousands of dollars, not counting staff and attorney time. In this instance, the Petitioners have failed to justify why the DLNR should bear such costs on a contested case hearing that would *not* provide substantially more evidence than has already been produced (or which could have been produced at the October 22, 2021 meeting).

There are also larger considerations. As previously discussed, HAR § 13-231-67 empowers the DLNR to issue revocable, commercial permits for the temporary use of state boat ramps on a month-to-month basis for no more than one year. Contested-case hearings, as a general matter, absorb a great deal of DLNR staff’s time and attention. If DLNR had to hold contested-case hearings on every one-year revocable permit, it would constantly be holding contested case hearings. Also, the contested case hearings could take longer than the one-year term of the revocable permit. This would lead to a substantial drain on state resources where the only issue is the renewal of month-to-month permits for *temporary* commercial use, which is revocable by the DLNR on 72-hours’ notice if a permittee fails to meet any of the conditions imposed by the permits. Therefore, Staff finds that the State has a substantial interest in avoiding an unnecessary hearing.

In sum, Petitioners’ claim of entitlement to a contested case hearing on these permits, based on the facts they have alleged, is not required under principles of constitutional due process.

3. Petitioner’s concerns are being addressed by other means.

The concerns that Petitioners raise must be -- and are being -- addressed by

²² *Flores*, 143 Hawai‘i at 127, 424 P.3d at 482.

²³ *Id.* at 482 (citing *Briggs v. Sullivan*, 954 F.2d 534, 53940 (9th Cir. 1992)).

other means. For example, a Mala Working Group has been formed to address various community concerns. DOBOR has also requested that its commercial permittees ask that their customers not park in the facility. Moreover, work to reconfigure the area to create additional parking has already begun and is anticipated to be completed within the next year.

Petitioners claim that commercial permittees monopolize Mala boat launch ramp by having customers sign contracts and obtain safety instructions while on the ramp. DOBOR will address this allegation directly with commercial permittees and reiterate that there is a thirty (30) minute time limit for use of the loading dock, as well as remind the permittees that these types of business activities need to take place offsite. DOBOR will also make this a condition of the permit, the violation of which may result in an administrative enforcement action if necessary to ensure compliance.

C. The DLNR has authorized the issuance of up to fifteen permits for commercial use of the Mala Boat Ramp.

Section 13-231-67(d), HAR, limits the number of Permits that can be issued for commercial use of the Mala launch ramp.

If Petitioners do not like the rules as promulgated, the appropriate recourse would be to file a petition under HRS § 91-6. As stated earlier, this is especially true here, where the claims asserted do not seem to relate to these particular permits but instead appear to be an attack on the wisdom of the entire permitting scheme that is memorialized in the administrative rules.

This rule was adopted in 1994 and amended in 2014 in order to limit the number of commercial permits allowed from DOBOR launch ramps. The rule is presumed legal and valid because it was adopted and amended pursuant to the procedures required by Hawaii Revised Statutes § 91-3. "Generally, administrative rules and regulations promulgated pursuant to statutory authority have the force and effect of law."²⁴ Additionally, a contested case hearing is not an appropriate vehicle for a challenge to the validity of an administrative rule.²⁵

D. Issuance of Permits for Mala Boat Ramp results in corresponding or reasonable benefits to the public under HAR § 13-231-50.

Petitioners claim that there are no "corresponding or reasonable benefits and returns to the public" as is required for the issuance of a DOBOR Permit. See HAR §

²⁴ *State v. Kimball*, 54 Haw. 83, 89, 503 P.2d 176, 180 (1972).

²⁵ See *generally* Haw. Rev. Stat. § 91-7 (setting forth the methods a challenger can use to seek declaratory judgment on the validity of administrative rules, which do not mention contested case hearings (or other administrative hearings of any kind)).

13-251-33. To the contrary, encouraging commercial use of State boating facilities will bring economic returns to the State, which is a public benefit. Also, allowing a limited number of Permits affords ocean recreation opportunities to the general public who otherwise may not have access to the State's ocean waters. DOBOR finds that these are “corresponding and reasonable benefits and returns to the public.”

Significantly, revenue from commercial operators also helps to fund DOBOR's maintenance of the Mala Boat ramp, which is otherwise free to public users like the Petitioners.

Staff therefore recommends that the Board adopt the finding that these are “corresponding and reasonable benefits and returns to the public” and deny the Petition pursuant to HAR § 13-1-29.1 for the reasons stated above.

IN CONCLUSION, pursuant to HAR § 13-1-29.1, the Board may deny a petition for a CCH when it is clear as a matter of law that there is no entitlement to a contested case hearing. Here, there is no statute, administrative rule, or interpretation of constitutional due process that entitles the Petitioners to a contested case hearing *on the specific Permits they challenge*.

As explained above, further hearing is not required to be held, either by applicable statutes or rules, or by constitutional due process, prior to the DOBOR's consideration of the Permittees' permit renewal applications for 2021–22. Despite the Petitioners' contentions, the heart of their issue is with existing valid and enforceable administrative rules, which disagreement is not entitled to a CCH. And finally, issuance of the Permits for the Mala Boat Ramp do provide corresponding and reasonable benefits to the public, as found in this submittal. The Board should therefore deny the Petition before it today.

The Board should also delegate to the Chairperson the authority to grant or deny any future petitions for a contested case hearing that are similar to the ones submitted by Petitioners in the interest of efficiency.

[See next page for
Recommendations and Signatures]

IV. RECOMMENDATIONS:

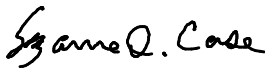
1. That the Board adopt all the findings stated above in the submittal and based on those findings, the Board deny the contested case hearing petition by Petitioners, pursuant to HAR § 13-1-29.1;
2. That the Board delegate authority to the Chairperson to grant or deny any future contested case hearing petitions regarding DOBOR's renewal of commercial use permits for Mala boat launch ramp;
3. That the Board authorize the Chairperson to take any and all actions necessary to effectuate its decision

Respectfully Submitted,



EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



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

Attachments:

- A. January 22, 2022 Contested Case Hearing Petition by Ka Malu O Kahālāwai, Nā Papa'i Wawae 'Ula'Ula, Kekai Keahi, and Kai Nishiki.
- B. PDF of PowerPoint Presentation by DOBOR staff before the Board at its meeting on February 25, 2022, regarding the informational item aigenized as #J-3.
- C. Abbreviated Summary of Mala Permits and Legal Challenges in 2021/2022.

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(808) 633-3966
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Attorney for Petitioners
KA MALU O KAHĀLĀWAI, NĀ PAPA'I WAWAE 'ULA'ULA,
KEKAI KEAHI, and KAI NISHIKI

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

In re Applications of)
OCEAN RIDERS, INC., under Permit No. 20-)
1265690; ADVENTURE RAFTING, INC.,)
under Permit No. 20-126744; LAHAINA)
PARA-SAIL, INC., under Permit Nos. 20-)
73175/MALA 08, 20-73202/MALA 09;)
LAHAINA WATER SKI, INC., under Permit)
No. 20-79363/MALA 12; PARASAIL)
KĀ'ANAPALI, INC., under Permit No. 20-)
73212/MALA 17; and WEST MAUI PARA-)
SAIL, INC., under Permit No. 20-)
73159/MALA 21, for Renewal of Commercial)
Use Permits to utilize Mala Wharf and Ramp, at)
Mala Wharf Road, Lahaina, Hawaii on the)
Island of Maui, TMK No. (2) 4-5-5:003)

PETITIONERS KA MALU O KAHĀLĀWAI NĀ PAPA'I WAWAE 'ULA'ULA, KEKAI KEAHI
AND KAI NISHIKI'S PETITION FOR CONTESTED CASE HEARING ON RENEWAL OF
COMMERCIAL USE PERMITS APPLICATIONS FOR USE OF MALA WHARF AND RAMP

KA MALU O KAHĀLĀWAI, a domestic non-profit corporation, NĀ PAPA'I WAWAE
'ULA'ULA, an unincorporated association, KEKAI KEAHI, individual, and KAI NISHIKI,
individual, by and through their undersigned counsel, hereby petition the Administrator of the
Division of Boating and Ocean Recreation, Department of Land and Natural Resources, or, in the

alternative, the Board of Land and Natural Resources, to hold a contested case hearing on any applications for commercial use permits for Commercial Use Permits to utilize Mala Wharf and Ramp, at Mala Wharf Road, Lahaina, Hawai'i on the Island of Maui, TMK No. (2) 4-5-5:003 ("Mala Wharf") pursuant to Hawai'i Administrative Rules ("HAR") §13-1-31 from Applicants (1) OCEAN RIDERS, INC., currently operating under Permit No. 20-1265690 with expiration date March 31, 2022; (2) ADVENTURE RAFTING, INC., currently operating under Permit No. 20-126744 with expiration date March 31, 2022; (3) LAHAINA PARA-SAIL, INC., currently operating under Permit Nos. 20-73175/MALA 08 and 20-73202/MALA 09 with expiration dates of April 30, 2022; (4) LAHAINA WATER SKI, INC., currently operating under Permit No. 20-79363/MALA 12 with expiration date of April 30, 2022; (5) PARASAIL KĀ'ANAPALI, INC., under Permit No. 20-73212/MALA 17, with expiration date of April 30, 2022; and (6) WEST MAUI PARA-SAIL, INC., under Permit No. 20-73159/MALA 21 (collectively, the "Mala Wharf CUPS").

Upon information and belief, the Mala Wharf CUPS will expire on either March 31, 2022 or April 30, 2022. New permits should not be issued to Ocean Riders, Inc., Adventure Rafting, Inc., Lahaina Para-Sail, Inc., Lahaina Water Ski, Inc., Parasail Kā'anapali, Inc., and West Maui Para-Sail, Inc., (collectively, the "Companies" or "permittees") unless and until Petitioners are afforded an opportunity to protect their property interests that are impacted by permit issuance, including property interests in the reasonable exercise of native Hawaiian traditional and customary practices, guaranteed by article XII, section 7 of the Hawai'i State Constitution and to a clean and healthful environment as defined by Chapter 200, HRS and regulations pertaining to commercial use of state boating facilities and waters, through contested case hearings as defined by Hawai'i Revised Statutes (HRS) § 91-1, and to provide information to assist decisionmakers in performing the necessary *Ka Pa'akai O Ka 'Aina* analysis.

I. PETITIONERS' INTERESTS IMPACTED BY PERMITS

Petitioner Ka Malu o Kahālāwai is organized to protect the natural and cultural history and resources of Kahoma and surrounding ahupua'a from mauka to makai. Ka Malu o Kahālāwai officers, members and supporters conduct traditional and customary practices, including but not limited to, of fishing, surfing, canoe paddling, gathering, launching a miniature traditional voyaging canoe and diving in nearshore areas and also pelagic fishing utilizing Mala ramp and wharf.

Petitioner Nā Papa'i Waewae 'Ula'ula ("Nā Papa'i") is an unincorporated association of West Maui residents and other beach users who are concerned about protecting and preserving the

quality of life and environment for West Maui communities particularly as it relates to the public's use and access of our coastlines. Nā Papa'i holds in-person community meetings with West Maui communities and administers a social media page on facebook.com called, "Access Denied!" which group has over 4,700 members.

Petitioners' officers and supporters, including Petitioner officer representative for Ka Malu o Kahālāwai, Kai Keahi, are Kānaka Maoli¹ traditional and customary practitioners who utilize Mala ramp to launch boats to conduct subsistence and customary fishing practices and to teach younger generations to do the same. HRS § 7-1, HRS § 1-1. These practices are protected by article XII, section 7 of the Hawai'i State Constitution. Petitioners also include many who live in the vicinity of Mala Wharf and utilize it regularly for recreational purposes in addition to traditional and customary practices. Petitioners' officers and supporters also conduct traditional and customary nearshore gathering and canoe paddling in waters that are impacted by commercial boating activity from Mala wharf and affected by pollution from commercial boating operations. Petitioners thus also have a property interest in their right guaranteed by article XI, § 9 of the Hawai'i State Constitution to a clean and healthful environment as defined by Chapter 200, HRS and regulations pertaining to commercial use of state boating facilities and waters, which is impacted by permit issuance.

i. Article XII, Section 7 of the Hawai'i State Constitution

Article XI, § 7 of the Hawai'i Constitution states that: "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights."

Petitioners' officers, members, and supporters include those who are descended from the aboriginal people that inhabited the Hawaiian islands in 1778. Petitioners' officers, members, and supporters include those who engage in traditional and customary practices in and around Mala Wharf, including, but not limited to, fishing, canoe paddling, diving, pelagic fishing, launching a mini-traditional voyaging canoe and who teach future generations to do the same. *See* Declaration of Kekai Keahi ("Keahi Decl.") ¶¶ 4-7; Declaration of Kai Nishiki ("Nishiki Decl.") ¶¶ 6-12.

Petitioners' officers and supporters have been repeatedly thwarted in the ability to use the ramp to conduct these practices, because commercial use permittees are not limited in the duration or

¹ Meaning, individuals who are descended from those who inhabited the Hawaiian archipelago in 1778, and whose reasonable exercise of traditional and customary practices is protected under Article XII, § 7 of the Hawai'i State Constitution.

frequency of their commercial use of the ramp. Permits could contain time restrictions on commercial use, but do not. Companies are allowed to set their own schedule of use for the ramp, and to utilize the ramp for numerous commercial trips throughout the day.

Permit issuance also impacts the use of shared facilities, such as parking that are necessary for access to and use of the ramp. The Companies dominate the limited trailer parking, and customers and employees of the Companies and other commercial users take up limited public parking.

The Customers congregating on the ramp also creates unsafe conditions as others try to utilize the ramp, as do those who are in the water and drift in out of the ramp area.

Issuance of commercial use permits to the Companies, without any protections afforded to Petitioners, will result in the continued violation of Petitioners' article XII, § 7 rights. For example, due to excessive commercial activity, Kekai Keahi has not been able to conduct his family's traditional and customary practice of 'ōpelu māmā. Keahi Decl. ¶ 16. This practice involves training a barracuda to "round up the 'ōpelu." Keahi Decl. ¶ 12-13. Commercial activity "scared away the opelu schools." Keahi Decl. ¶ 16. Commercial activity also negatively impacts a traditional fishing ko'a located off of Mala wharf by scaring away fish. Keahi Decl. ¶ 18. Petitioners are also often greatly impeded in their ability to access the ramp to launch boats to conduct traditional and customary practices due to permittees use of the ramp.

Conditions could be placed on the permits to limit the frequency and duration of permittees use of the ramp to ensure that others, including Petitioners, may access the ramp for traditional and customary practices, as well as for recreational use.

ii. Article XI, Section 9 of the Hawai'i State Constitution

Petitioners are also entitled to procedural due process based upon their substantive right to a clean and healthful environment. *See In re Mani Elec. Co., Ltd.*, 408 P.3d 1, 12-13 (2017) ("The right to a clean and healthful environment' is a substantive right guaranteed to each person by article XI, section 9 of the Hawai'i Constitution."). Article XI, § 9 of the Hawai'i State Constitution provides: "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." This right is defined in relation to existing laws related to environmental quality. *Id.* 408 P.3d at 13.

The Board's authority to issue commercial use permits is derived from HRS § 200-2(a), which grants the Board "primary responsibility for administering the ocean recreation and coastal

areas programs and performing the functions heretofore performed by the department of transportation and the department of public safety in the areas of boating safety, conservation, search and rescue, and security of small boat harbor environs.” HRS §200-2(a) (emphasis added). The duty specific to commercial use permits is further delegated to DOBOR. HRS § 200-4 empowers the Board to adopt rules to regulate vessels entrance into waters at State-owned launching ramps, “regulate the embarking and disembarking of passengers” at launching ramps; to promote safety at launching ramps, “to regulate and control recreational and commercial use” of launching ramps. HRS § 200-4. Further, to “prevent discharge of throwing into . . . launching ramps. . . ocean waters, and navigable streams of rubbish, refuse, garbage, or other substances likely to affect the quality of water of that contribute to making [those places] unsightly, unhealthful, or unclean” the Board is empowered to adopt “requirements for permits and fees” for the launching of commercial vessels from State-owned ramps, and requirements governing those activities. HRS § 200-4(a)(6)(a)(i), -(ii). HRS § 200-3 also imposes a duty upon the Board to assist “in abating air, water, and noise pollution.” HRS § 200-3(8).

HAR § 13-231-5(a) requires that to qualify for reissuance of a commercial use permit, commercial use permittees must “fully” comply with “the rules governing small boat harbors and navigable waters managed by the department of land and natural resources. . . .” HAR § 13-231-5(a). These rules include HAR § 13-252-6 “Littering or polluting water – prohibited,” which provides that:

No person shall place, throw, deposit, or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of a small boat harbor any litter, sewage, or other gaseous, liquid, or solid materials which render the water unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health and welfare or to the enjoyment of the water for recreational purposes.

HAR § 13-252-6. Commercial use permittees must also comply with HAR §§ 13-232-1 through -19 pertaining to sanitation. The commercial use regulations thus are in place to, in part, regulate the impact of commercial uses on environmental quality. Petitioners’ therefore have a protected property interest in their right to a clean and healthful environment, as defined by HRS chapter 200 and administrative regulations governing commercial use of boating facilities and state waters.

Mala wharf permit operations include the use of ocean-going vehicles that may lack restroom facilities. Customers of these operations include tourists from areas that lack regulations requiring reef-safe sunscreen and who are not educated in Hawai’i regulations such that they

purchase unsafe sunscreens that remain available for sale. The operations and their users increase noise levels in otherwise relatively quiet ocean spaces. These polluting activities compromise and degrade ocean water resources and natural beauty of the area.

Issuance of permits to the Companies contributes to ongoing degradation of environmental quality and the safety of the ramp, which harms Petitioners' right to a clean and healthful environment.

iii. Due Process Requires a Contested Case Hearing

"Procedural due process 'requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues.'" *Application of Hawai'i Elect. Light Co.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984). To determine what procedures due process demands, courts consider: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Protect & Pres. Kahoma Ahupua'a Ass'n*, 149 Hawai'i 304, 313, 489 P.3d 408, 471 (2021) (citation omitted).

As stated, Petitioners' have constitutionally protected property interests in the exercise of traditional and customary rights at Mala Wharf, as well as protected interested in their right to a clean and healthful environment that are impacted by the issuance of permits to the Companies. Access to the ramp is necessary to launch boats to conduct traditional and customary practices. Issuance of the permits directly and negatively impacts Petitioners' ability to access and utilize the ramp. Petitioners also conduct other practices in the nearshore area that are impacted by the Permittees activities.

The risk of an erroneous deprivation of these rights is high. Petitioners' have no other means to comment on or be consulted regarding issuance of specific permits, which are administratively approved.² Petitioners' ability to conduct traditional and customary practices at Mala

² Petitioners acknowledge that at the October 22, 2021 Board of Land and Natural Resources hearing, the Board instructed the Administrator of the Division of Boating and Ocean Recreation to meet with the community to address the ongoing problems regarding community access at Mala Wharf. Petitioners, however, continue to contest that such a meeting does not satisfy due process, as such a meeting is policy oriented, does not related to the issuance of these specific permits, and does not provide an opportunity for Petitioners to develop a record upon which a court could review whether Petitioners' property interests were sufficiently protected. Further, there are no procedural safeguards in place in a community meeting to ensure that Petitioners are heard, have the opportunity present evidence, and to cross-examine opposing witnesses. As such, the proposed

Wharf and right to a clean and healthful environment have been and will continue to be negatively impacted absent a contested case.

Agencies are obligated “to protect reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.” *Ka Pa‘akai O Ka‘aīna v. Land Use Commission*, 94 Hawai‘i 31, 35, 7 P.3d 1068, 1072 (citing *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission* (“PASH”), 79 Hawai‘i 425, 250 n. 43, 903 P.2d 1246, 1271 n. 43 (1995)). As part of that duty, agencies must independently consider the effects of their decisions on traditional and customary practices. *Ka Pa‘akai*, 94 Hawai‘i at 46, 7 P.3d at 1083. A contested case hearing would enable Petitioners to provide DOBOR with information about the impacts of the issuance of commercial use permits on Petitioners’ practices and assist the State with conducting the required balancing to protect the reasonable exercise of native Hawaiian traditional and customary practices to the extent feasible. Petitioners can provide information about the traditional and customary practices that underlie those rights, how they are affected, and how they may be feasibly protected. With this information, DOBOR could tailor permit conditions consistent with their public trust duties to protect the exercise of Petitioners’ traditional and customary rights.

Additionally, the State’s marine waters and submerged lands are held in public trust, and “are subject to the State’s constitutional and common-law public trust duties.” *Umberger v. Dep’t of Land & Natural Res.*, 403 P.3d 277, 298 (2017). An “agency must perform its functions in a manner that fulfills the State’s affirmative obligations under the Hawai‘i constitution.” *In re Application of Gas Co.*, 147 Hawai‘i at 207, 465 P.3d at 654. The State is thus “obligated to manage and preserve” the waters in and around Mala Wharf “[f]or the benefit of present and future generations[.]” *Haleakala v. Bd. of Land and Natural Resources*, 131 Haw. 193, 317 P.3d 27, 46 (2013) (Acoba, J., concurring). (quoting Haw. const. Art. XI, § 1). Issuance of permits to the Companies impacts ocean waters. Thus, a contested case would also assist the State to uphold its obligations as a fiduciary of this public trust resources.

Costs to the government to hold a contested case may be mitigated by the Board’s rules in that give a presiding hearings officer power to shape a hearing for efficiency. *See* HAR § 13-1-32(c) and (h).³ Once

meetings, although a welcome step forward, do not satisfy due process.

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

(c) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses,

a contested case is granted, the Board may also encourage the parties to mediation. HRS § 91-8.5. The parties are also represented by legal counsel, which will help facilitate efficient proceedings.

II. DISAGREEMENT WITH APPLICATIONS

Commercial use permits for use of Mala Wharf are not “allowed without corresponding and reasonable benefits and returns to the public.” HAR § 13-231-50. Mala wharf CUPs have not brought corresponding or reasonable benefits and returns to the public, but rather exclude public use of Mala Wharf.

HAR § 13-231-61 conditions permit reissuance on (1) a threshold of gross receipts received from the companies, (2) that all fees and charges owed to the State have been paid, (3) that the permittee has no violations outstanding, (3) that the permit was not previously terminated for cause, and (4) that a company be in operation for at least twelve months if it is seeking reissuance of a permit where there has been a transfer of interest in the corporation. HAR § 13-221-61. These conditions thus only ensure financial *returns* are provided to the public. They do not ensure “corresponding and reasonable benefits” to the public. Mere compliance with the law – i.e., not having any outstanding violations or having had a permit previously terminated for cause – cannot reasonably be construed as providing a “benefit” to the public. Meeting the reissuance conditions of HAR § 13-231-61 alone therefore does not ensure compliance with HAR § 13-231-50.

In addition, when the negative impacts to the general public’s ability to use Mala Wharf and the diminishment of native Hawaiian rights are weighed with the benefits to those who patronize the companies, the reissuance of permits to the Companies without any safeguards to address such negative impacts does not provide corresponding or reasonable benefits to the public.

Petitioners also disagree with the Mala wharf CUPs because the conditions imposed do not feasibly protect Kānaka maoli’s reasonable exercise of traditional and customary practices that are negatively affected by the Companies’ operations at Mala wharf.

Petitioners do not contest the number of commercial use permits that may be issued at Mala

certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. If the hearing is conducted by the board, the board members may examine and cross-examine witnesses.

...

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

Wharf set forth in HAR § 13-231-67(d), or the regulatory scheme enabling commercial uses. Rather, Petitioners seek to protect their interests with respect to the issuance of individual permits to conduct commercial operations at Mala ramp. DOBOR has the power and duty to place conditions on the Companies' permits to ensure that the Companies' permitted use of Mala Wharf does not curtail reasonable exercise of native Hawaiian traditional and customary practices, and to protect Petitioners' property interest in a clean and healthful environment, as well as to ensure the commercial use provides reasonable and corresponding benefits to the public. Petitioners' seek contested case proceedings to assist with this.

III. RELIEF SOUGHT

Petitioners seek relief in a contested case hearing that will adjudicate the rights and interests of Petitioners with respect to the issuance/reissuance of permits to the Companies. Petitioners also request a contested case to assist DOBOR in fulfilling its duties under article XII, section 7 of the Hawai'i State Constitution and the mandate of *Ka Palakāʻō Ka Aina n. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000), which sets forth the types of findings of fact and conclusions of law that an agency must provide to effectuate its constitutional obligation.

Due process requires DOBOR to observe the following procedures: (1) refrain from granting Mala wharf permit reissuance applications; (2) hold a contested case hearing on the impact of these permitted activities on Petitioners' rights and interests; (3) enter findings on Petitioners' rights and interests, the impact of permitted activities on those rights, and develop feasible protections against those impacts.

Such outcomes could include denial of the permits, required improvements to commercial operations to prevent pollution, increased training requirements for customers and employees to lessen impact to natural and cultural resources, requiring personnel and customers use provided reef-safe sunscreens, limiting the number of launches or patrons per day, or permitting Companies to launch from Mala Wharf but requiring them to pick up customers from Lahaina Harbor.

IV. PETITIONERS' CONTESTED CASE SERVES THE PUBLIC INTEREST

Petitioners' participation in a contested case would serve to vindicate public interest in public use of Mala wharf and ramp. Petitioners seek relief that would protect the public's ability to use Mala wharf and the nearby environs. *See supra* Part III. Petitioners also seek relief to assist the agency in conducting its affirmative constitutional obligations.

V. PETITIONERS' INFORMATION WILL ASSIST DECISIONMAKING

DOBOR is obligated to conduct an analysis to ensure that permitting decisions will not unreasonably burden Petitioners' traditional and customary rights under article XII, §7 of the Hawai'i constitution. Petitioners can provide information about the traditional and customary practices that underlie those rights, how they are affected, and how they may be feasibly protected to assist DOBOR in complying with *Ka Pa'ukai O Ka 'Aina*. Petitioners also include members of the public that regularly use Mala wharf and ramp and have had numerous engagements with DOBOR personnel in regard to ways of resolving user conflicts and impacts on natural resources and traditional and customary practices. Petitioners have witnessed on a regular basis and also documented the conditions at Mala wharf, which could be presented in evidence. DOBOR is also a fiduciary of public trust waters, and obligated to ensure that the issuance of the permits does not unduly harm such resources.

To the extent that issuance of permits and contested cases regarding issuance of said permits is a matter within the jurisdiction and authority of the Board of Land and Natural Resources solely, Petitioners alternatively seek a contested case before the Board for the same reasons mentioned herein.

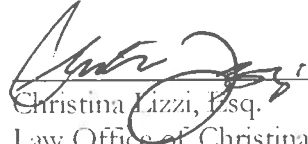
VI. CONCLUSION

Petitioners' interests – as native Hawaiians whose traditional and customary practices are impacted, and as those who have a constitutional right to a clean and healthful environment defined by the laws regulating the resource, and those who are beneficiaries of the public trust – mandate that contested case be held prior to issuance or renewal of commercial use permits to the Companies. "Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210, 1214 (1994). Granting the Companies' applications for commercial use permits pursuant to HAR § 13-231-61 at Mala Wharf adversely affects Petitioners' legal interests, mandating a hearing. DOBOR may not deny Petitioners' request for a contested case on the basis that Petitioners do "not have a legal right, duty, or privilege entitling one to a contested case proceeding." HAR § 13-1-29.1. Rather, Petitioners' property interests entitle them to be admitted as parties to a contested case pursuant to HAR § 13-1-31(b)(2).

For these reasons, Petitioners respectfully request that that DOBOR, or alternatively, the Board of Land and Natural Resources, grant a contested case on the above-captioned permits.

DATED: Wailuku, Maui, Hawai'i

January 22, 2022



Christina Lizzi, Esq.
Law Office of Christina Lizzi, LLC
Attorney for Petitioners

8. My family has lived in West Maui for generations.
9. My grandmother's home is located about 300 yards from Mala wharf.
10. I learned to fish and dive at Mala wharf.
11. I am a lineal descendant of owners of a kuleana parcel in Kanahā Valley, where we were raised as small children.
12. Until I was in seventh or eighth grade, approximately 35 years ago, I would go with my father and others in my family to conduct traditional and customary fishing practices in the area of Mala wharf and ramp.
13. Our traditional and customary fishing practice involved an 'ōpelu māmā.
14. We trained a barracuda, called the 'ōpelu māmā, so that it would round up the 'ōpelu.
15. We would paddle out, hit the boat with a specific drum beat, and the 'ōpelu māmā would go to the canoe.
16. Boat captains, like my father, would name their 'ōpelu māmā. My father's 'ōpelu māmā was called Jacob. He was recognizable because he had a blind eye.
17. Once Jacob rounded up the 'ōpelu into a ball we could more easily catch the 'ōpelu.
18. Our traditional fishing practice of 'ōpelu māmā ceased when commercial activity increased at Mala Wharf and Ramp, which scared away the opelu schools.
19. The knowledge of how to train the 'ōpelu māmā will be lost without places where future generations are able to learn it.
20. There is a traditional fish ko'a off of Mala wharf, but the fish have largely been scared away from it by commercial activity and use of Mala wharf and ramp.
21. I and other officers and supporters of Ka Malu O Kahālāwai have had difficulty finding parking at Mala wharf due to commercial permittees use of limited boat trailer parking, which prevents us from being able to launch our boats or cuts our time short.
22. Customers and staff of commercial use permittees at Mala wharf take up the parking spaces that are supposed to be available to the general recreational public, which reduces access to ramp for us to conduct our practices.
23. Commercial companies arrive at Mala wharf and ramp early and use the ramp repeatedly throughout the day.
24. None of the permits I have seen issued to the permittees has included a limitation on the frequency or duration of commercial use of the ramp.
25. Many of the permittees launch and return multiple times per day from the ramp.

26. Fishermen, including officers of Ka Malu, must compete with the commercial use permittees for an opportunity to launch their boats and again to return to the ramp.
27. The monopolization of the ramp by commercial use permittees forces us to cut our practices short, or to not engage in them at all.
28. I have observed large groups gathering at the ramp waiting to board commercial use permittees' vessels, which makes it more difficult and dangerous for others trying to launch from the ramp.
29. Excessive commercial activity negatively impacts the environment around Mala wharf, including through pollutants from the boats, litter, and use of non-reef safe sunscreens.
30. I, and others in my 'ohana and Ka Malu o Kahālāwai, have been unable to conduct our traditional and customary practices of fishing due to the lack of parking spaces, inability to launch our boats from Mala ramp, and the uncertainty and complications associated with timing a return to the ramp due to commercial use permittees.
31. I, and others in Ka Malu o Kahālāwai have attempted to raise our concerns to the Division of Boating and Ocean Recreation by talking to Ed Underwood and Paul Sensano, and DOBOR staff were unable to resolve our concerns.
32. I, and others in Ka Malu o Kahālāwai have attempted to raise our concerns to commercial use permit holders, but they denied having any responsibility for ensuring access for the recreational public or Hawaiian traditional and customary practitioners.
33. I, and others in Ka Malu o Kahālāwai are now participating in DOBOR's working group concerning Mala Wharf, however, the working group does not address the impacts of individual permittees or the issuance of specific permits. The group is merely advisory to DOBOR.

DECLARANT FURTHER SAYTEH NAUGHT.

Dated: Lahaina, Maui, Hawai'i

January 20, 2022



KEKAI KEAHI

Petitioner, Ka Malu O Kahālāwai

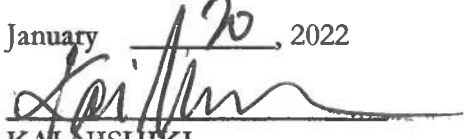
Hawaiian cultural practices, subsistence, aesthetic enjoyment, and ecological protections for West Maui.

7. My family and I have often been thwarted in attempts to use public beach access parking stalls located near to Mala wharf and ramp due to overcrowding.
8. I, and my family, frequently use Mala Wharf and surrounding shoreline areas for recreational purposes and to serve our aesthetic interests.
9. I, members of my family, and Nā Papa'i officers, members and supporters frequently surf, paddle, fish, swim, spearfish, snorkel and boat in waters around Mala Wharf.
10. I hold a recreational and aesthetic interest in the maintenance of a healthy marine environment at Mala Wharf and its shoreline areas.
11. Officers, members and supporters of Nā Papa'i include spearfishers, fishers, surfers, paddlers, swimmers, native Hawaiian traditional and customary practitioners, and others concerned about the environment created by commercial operations at Mala Wharf and how permittees activities have impeded the ability to engage in traditional and customary practices, as well as recreation in the area.
12. Members have been thwarted in their ability to engage in traditional and customary practices due to the monopolization of the ramp by commercial use permittees.
13. Members of Nā Papa'i have been thwarted in their ability to launch boats to engage in traditional and customary practices from the ramp due to commercial permittees repeat use of the ramp throughout the day.
14. From the commercial use permits I have seen, there is no standard condition limiting the amount of time each permittee may use the ramp or the number of trips commercial users may make from the ramp per day.
15. Members of Nā Papa'i have been thwarted in their ability to engage in traditional and customary practices due to commercial use permittees' employees and customers taking up the limited parking available in and around Mala wharf.
16. Commercial use permittees create dangerous conditions on the ramp, as their customers crowd the ramp waiting for their tour, to sign waivers, to receive instructions or to load onto the boat.
17. Mala Wharf and the nearshore areas are frequently crowded with various thrillcraft jetskis, wave runners, catamarans, and other commercial activities.

18. Holding a contested case hearing prior to issuance of commercial use permits to the companies would further Nā Papa'i's mission and my interests in recreation and protecting the clean and healthful environment of West Maui and the waters in and around Mala Wharf specifically, and to protect the reasonable exercise of traditional and customary Native Hawaiian practices that rely on access to the ramp.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Lahaina, Maui

January 20, 2022

KAI NISHIKI
Petitioner-Declarant

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

In re Applications of)
) REQUEST FOR WAIVER OF CONTESTED
) CASE FILING FEE
OCEAN RIDERS, INC., under Permit No. 20-)
1265690; ADVENTURE RAFTING, INC.,)
under Permit No. 20-126744; LAHAINA)
PARA-SAIL, INC., under Permit Nos. 20-)
73175/MALA 08, 20-73202/MALA 09;)
LAHAINA WATER SKI, INC., under Permit)
No. 20-79363/MALA 12; PARASAIL)
KĀ'ANAPALI, INC., under Permit No. 20-)
73212/MALA 17; and WEST MAUI PARA-)
SAIL, INC., under Permit No. 20-)
73159/MALA 21, for Renewal of Commercial)
Use Permits to utilize Mala Wharf and Ramp, at)
Mala Wharf Road, Lahaina, Hawai'i on the)
Island of Maui, TMK No. (2) 4-5-5:003)

REQUEST FOR WAIVER OF CONTESTED CASE FEE

NĀ PAPA'I WAWAE 'ULA'ULA, an unincorporated association, KA MALU O KAHĀLĀWAI, a domestic non-profit corporation, KEKAI KEAHI and KAI NISHIKI, individuals, by and through their undersigned counsel, request a waiver of the \$100 fee for their contested case request under HAR §13-1-30. Petitioners are community-based organizations, associations, and individuals who have no commercial properties to gain from their challenge to the above-referenced permits. For these reasons, Petitioners respectfully request the Board grant this waiver.

DATED: Wailuku, Maui, Hawai'i

January 22, 2022


CHRISTINA LIZZI
LAW OFFICE OF CHRISTINA LIZZI LLC
ATTORNEY FOR PETITIONERS

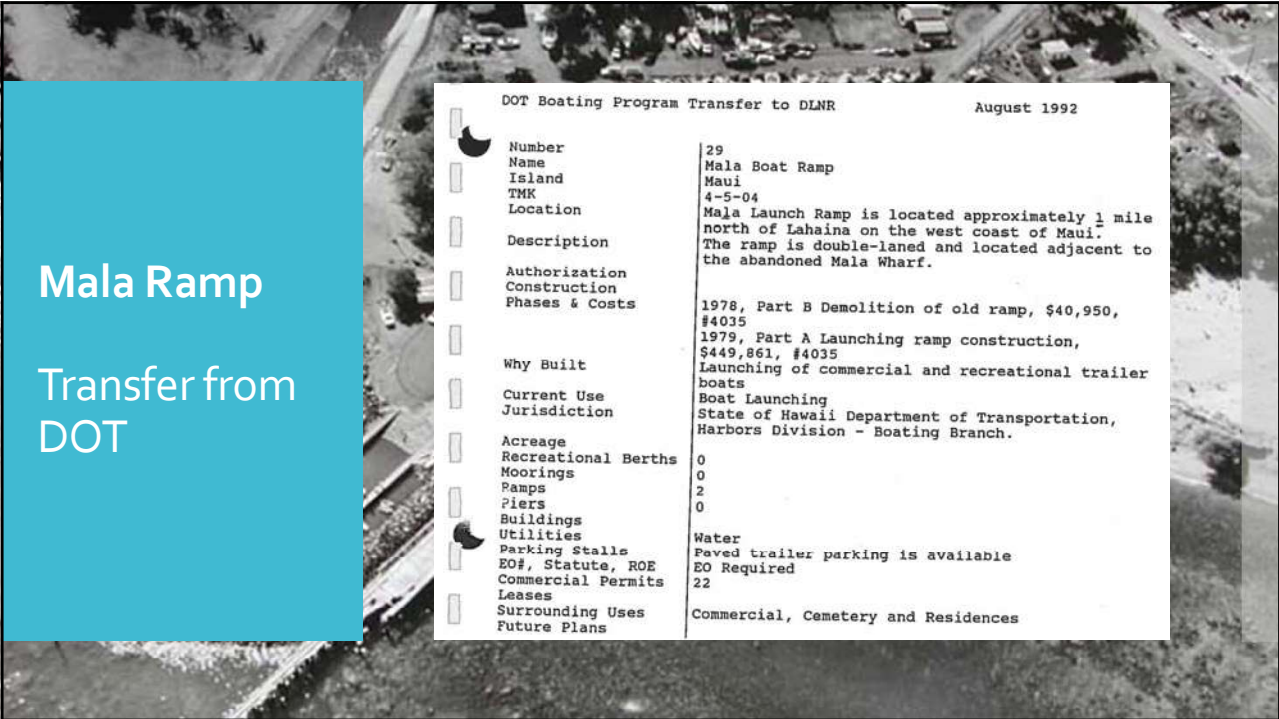


Mala Wharf & Boat Ramp

Overview & Information

- **Approx. 1 mile north of Lahaina, Maui**
- **Facilities available:**
 - 2 launch ramps, 2 loading docks
 - Vessel washdown, restrooms, and shower
- **Commercial permits for Mala:**
 - 15 ramp permits authorized by HAR 13-231-67(d)(5)
 - 1 ramp permit grandfathered
 - 7 shoreline permits (no limit)

SLIDE 1



Mala Ramp

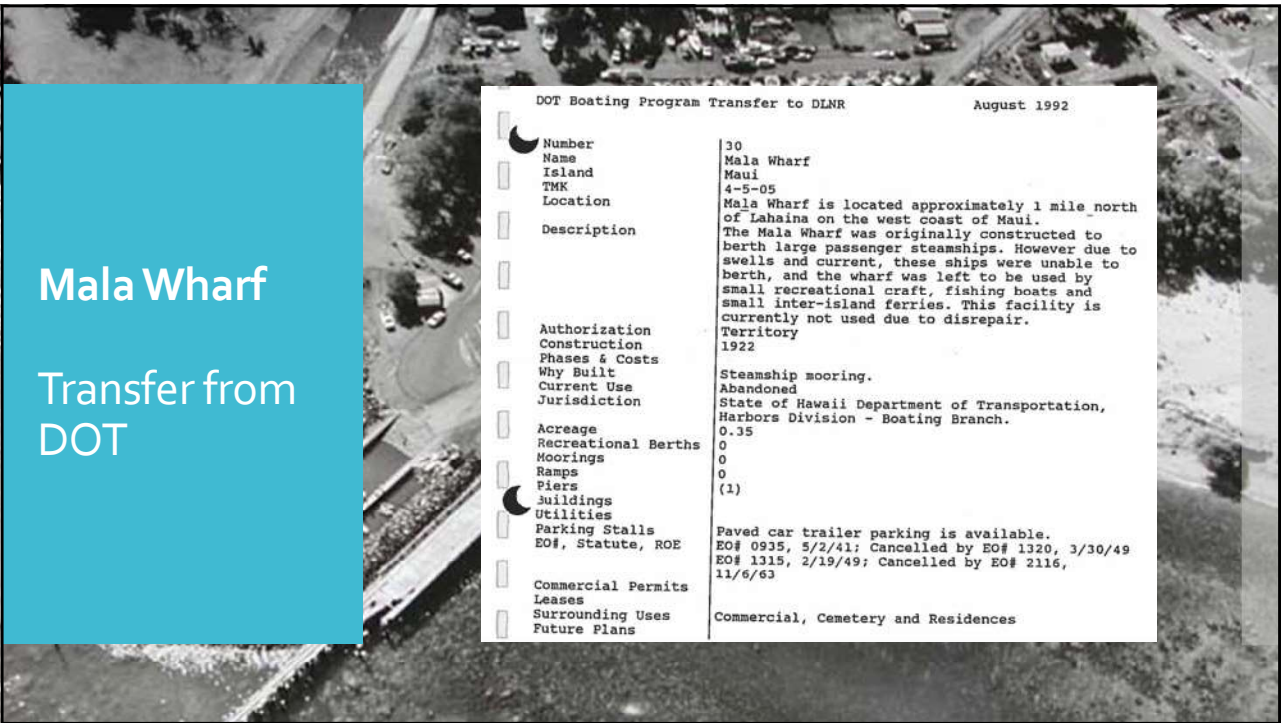
Transfer from DOT

DOT Boating Program Transfer to DLNR		August 1992
Number	29	
Name	Mala Boat Ramp	
Island	Maui	
TMK	4-5-04	
Location	Mala Launch Ramp is located approximately 1 mile north of Lahaina on the west coast of Maui. The ramp is double-laned and located adjacent to the abandoned Mala Wharf.	
Description		
Authorization		
Construction	1978, Part B Demolition of old ramp, \$40,950, #4035	
Phases & Costs	1979, Part A Launching ramp construction, \$449,861, #4035	
Why Built	Launching of commercial and recreational trailer boats	
Current Use	Boat Launching	
Jurisdiction	State of Hawaii Department of Transportation, Harbors Division - Boating Branch.	
Acreage		
Recreational Berths	0	
Moorings	0	
Ramps	2	
Piers	0	
Buildings		
Utilities	Water	
Parking Stalls	Paved trailer parking is available	
EO#, Statute, ROE	EO Required	
Commercial Permits	22	
Leases		
Surrounding Uses	Commercial, Cemetery and Residences	
Future Plans		

SLIDE 2

Mala Wharf


Transfer from DOT



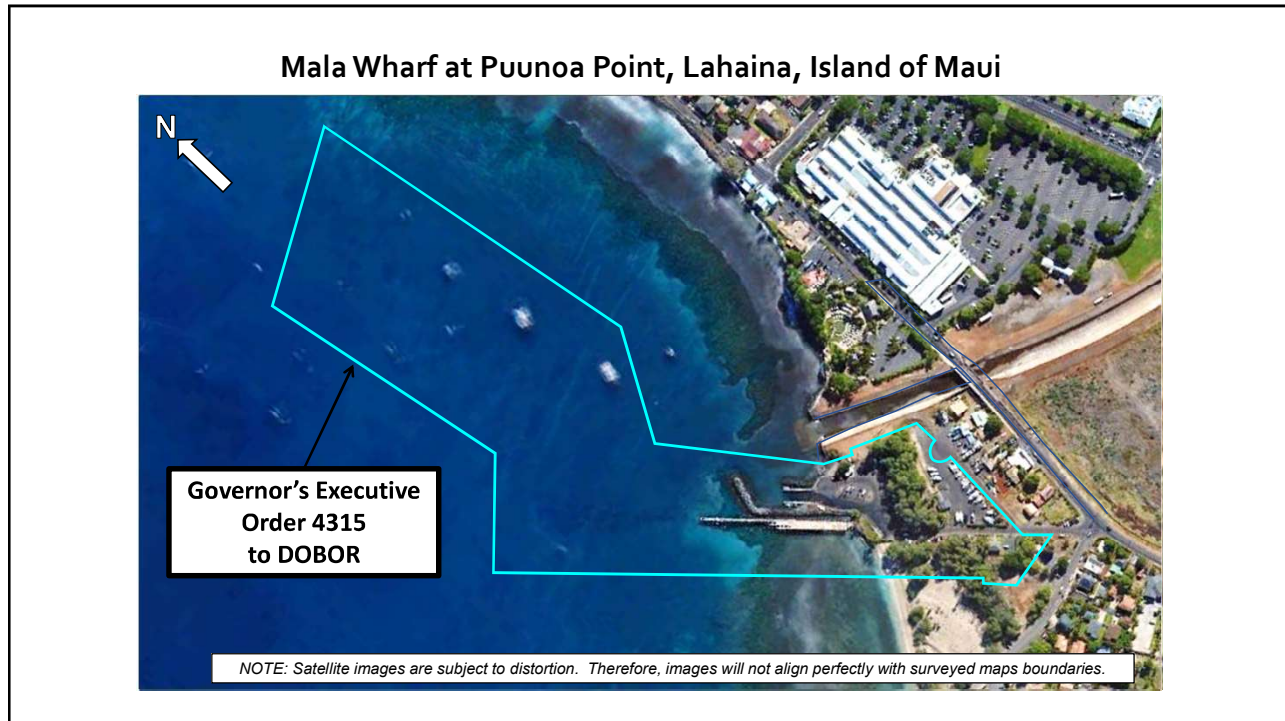
DOT Boating Program Transfer to DLNR		August 1992
Number	30	
Name	Mala Wharf	
Island	Maui	
TMK	4-5-05	
Location	Mala Wharf is located approximately 1 mile north of Lahaina on the west coast of Maui.	
Description	The Mala Wharf was originally constructed to berth large passenger steamships. However due to swells and current, these ships were unable to berth, and the wharf was left to be used by small recreational craft, fishing boats and small inter-island ferries. This facility is currently not used due to disrepair.	
Authorization	Territory	
Construction	1922	
Phases & Costs		
Why Built	Steamship mooring.	
Current Use	Abandoned	
Jurisdiction	State of Hawaii Department of Transportation, Harbors Division - Boating Branch.	
Acreeage	0.35	
Recreational Berths	0	
Moorings	0	
Ramps	0	
Piers	(1)	
Buildings		
Utilities		
Parking Stalls	Paved car trailer parking is available.	
EO#, Statute, ROE	EO# 0935, 5/2/41; Cancelled by EO# 1320, 3/30/49 EO# 1315, 2/19/49; Cancelled by EO# 2116, 11/6/63	
Commercial Permits		
Leases		
Surrounding Uses	Commercial, Cemetery and Residences	
Future Plans		

SLIDE 3

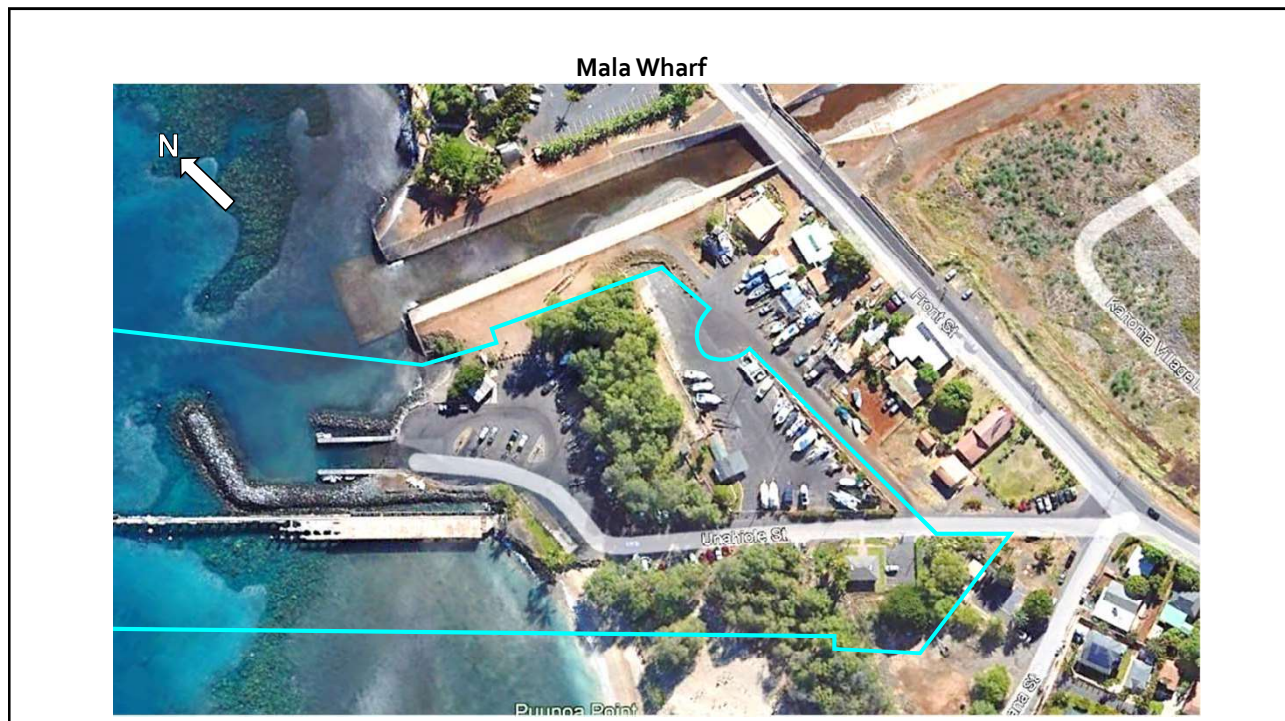
Mala Wharf Lahaina, Maui



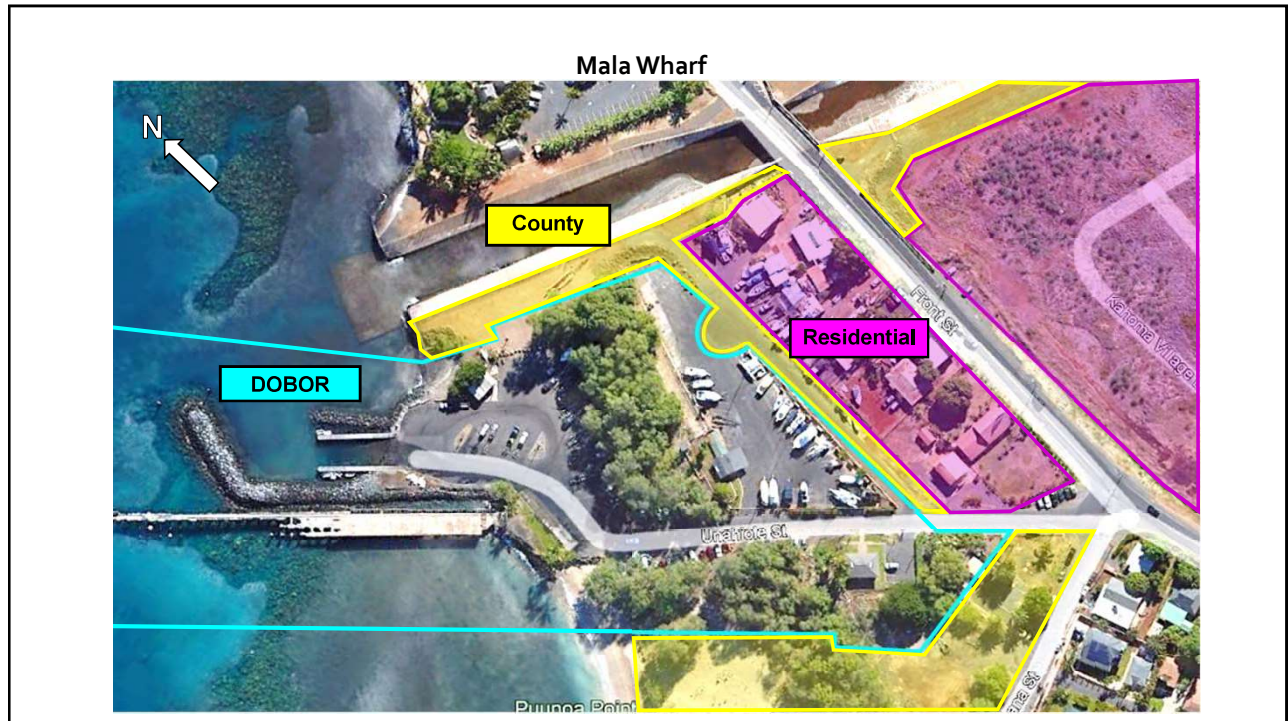
SLIDE 4



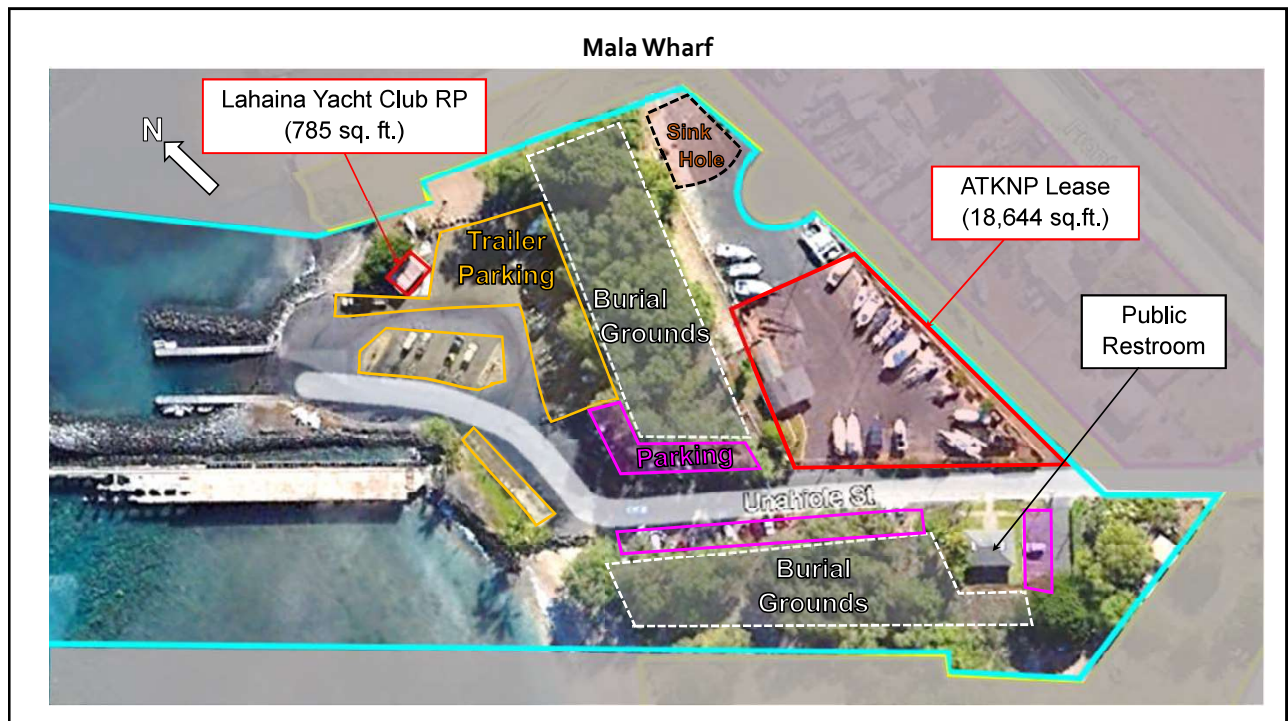
SLIDE 5



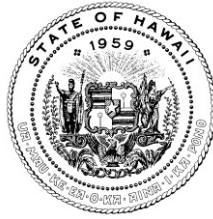
SLIDE 6



SLIDE 7



SLIDE 8



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF BOATING AND OCEAN RECREATION
4 SAND ISLAND ACCESS ROAD
HONOLULU, HAWAII 96819

Timeline of Commercial Use Permits Applicable to Mala Boat Launch Ramp
As of March 11, 2022

Permittee	Permit No.	Expiration	Timeline
Adventure Rafting, Inc.	20-126744	3/31/22 (temp) 12/31/22	11/22/21: CCH Petition (dated) 12/29/21: <i>Temporarily renewed (3 mo.)</i> 1/5/22: Appealed (2CCV-22-003) 1/14/22: CCH Denied (BLNR Item #J-1) 1/24/22: <i>Renewed (remainder of 12 mo.)</i> 1/24/22: CCH Petition (rec'd) 1/28/22: Appealed (2CCV-22-026) 3/24/22: <i>BLNR action pending</i>
Hawaiian Rafting Adventure, Inc.	20-115058	10/31/22	10/6/21: CCH Petition (dated) 10/22/21: CCH Denied (BLNR Item #J-5) 10/29/21: <i>Renewed (12 mo.)</i> 11/10/21: Appealed (2CCV-21-336)
Hawaiian Rafting Adventure, Inc.	20-115036	10/31/22	10/6/21: CCH Petition (dated) 10/22/21: CCH Denied (BLNR Item #J-5) 10/29/21: <i>Renewed (12 mo.)</i> 11/10/21: Appealed (2CCV-21-336)
Lahaina Harbor Water Taxi Inc.	20-115818	10/31/22	10/6/21: CCH Petition (dated) 10/22/21: CCH Denied (BLNR Item #J-5) 10/29/21: <i>Renewed (12 mo.)</i> 11/10/21: Appealed (2CCV-21-336)
Kaanapali Beach Watercraft Rentals, Inc.	20-98310	7/31/22	7/27/21: CCH Petition (dated) 7/29/21: <i>Renewed (12 mo.)</i> 10/8/21: CCH Denied (BLNR Item #J-1)
Lahaina Para-Sail, Inc.	20-73175	4/30/22	1/24/22: CCH Petition (rec'd) 3/24/22: <i>BLNR action pending</i>
Lahaina Para-Sail, Inc.	20-73202	4/30/22	1/24/22: CCH Petition (rec'd) 3/24/22: <i>BLNR action pending</i>
Lahaina Water Ski Inc.	20-79363	4/30/22	1/24/22: CCH Petition (rec'd) 3/24/22: <i>BLNR action pending</i>

Permittee	Permit No.	Expiration	Timeline
Noio Charters, Inc.	20-104046	12/31/22 (temp) 8/31/22	7/28/21: CCH Petition (dated) 8/30/21: <i>Temporarily renewed (3 mo.)</i> 9/29/21: Appealed (2CCV-21-292) 10/8/21: CCH Denied (BLNR Item #J-1) 11/19/21: <i>Renewed (remainder of 12-mo.)</i> 11/22/21: CCH Petition (dated) 1/5/22: Appealed (2CCV-22-002) 1/14/22: CCH Denied (BLNR Item #J-1)
Pacific Jet Sports, Inc.	20-98143	7/31/22	7/27/21: CCH Petition (dated) 7/29/21: <i>Renewed (12 mo.)</i> 10/8/21: CCH Denied (BLNR Item #J -1)
Pacific Jet Sports, Inc.	20-97968	7/31/22	7/27/21: CCH Petition (dated) 7/29/21: <i>Renewed (12 mo.)</i> 10/8/21: CCH Denied (BLNR Item #J -1)
Parasail Kaanapali, Inc.	20-73212	4/30/22	1/24/22: CCH Petition (dated) 3/24/22: <i>BLNR action pending</i>
Extended Horizons Inc.	20-92982	12/31/22 (temp) 8/31/22	7/28/21: CCH Petition (dated) 8/30/21: <i>Temporarily renewed (3 mo.)</i> 9/29/21: Appeal (2CCV-21-292) 10/8/21: CCH Denied (BLNR Item #J-1) 11/19/21: <i>Renewed (remainder of 12-mo.)</i> 11/22/21: CCH Petition (dated) 1/05/22: Appealed (2CCV-22-002) 1/14/22: CCH Denied (BLNR Item #J-1)
Underwater Safari, Inc.	20-115013	10/31/22	10/6/21: CCH Petition (dated) 10/22/21: CCH Denied (BLNR Item #J-5) 10/28/21: <i>Renewed (12 mo.)</i> 11/10/21: Appealed (2CCV-21-336)
West Maui Para-Sail, Inc.	20-73159	4/30/22	1/24/22: CCH Petition (rec'd) 3/24/22: <i>BLNR action pending</i>
Ocean Riders, Inc.	20-126690	3/31/22 (temp) 12/31/22	11/22/21: CCH Petition (dated) 12/28/21: <i>Temporarily renewed (3 mo.)</i> 1/5/22: Appealed (2CCV-22-003) 1/14/22: CCH Denied (BLNR Item #J-1) 1/24/22: <i>Renewed (remainder of 12-mo.)</i> 1/24/22: CCH Petition (rec'd) 1/28/22: Appealed (2CCV-22-026) 3/24/22: <i>BLNR action pending</i>