

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

June 12, 2015

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

Subject: Settlement Agreement with Sea Sport Cruises, Inc. for Coral Damage Resulting from the September 10, 2013 *Ocean Odyssey* Vessel Grounding near Ma‘alaea Harbor, Maui

Summary: This submittal requests the Board to find that Sea Sport Cruises, Inc. (“SSC”) violated Hawaii Administrative Rules §13-95-70 by breaking and damaging approximately 20 specimens of stony coral (or approximately 47 square meters of poor quality reef) when its vessel, the *Ocean Odyssey*, ran aground near Ma‘alaea Harbor, Maui, on September 10, 2013. In satisfaction of the damage to natural resources on public lands, DAR recommends that the Board approve the proposed settlement payment from SSC to the State in the amount of \$7,000 as an agreed-upon contribution to be held in trust for the purpose of repairing and maintaining State moorings in Maui County.

Date of Incident: September 10, 2013

Against: Sea Sport Cruises, Inc.
300 Ma‘alaea Rd., Suite 211
Wailuku, HI 96793

Location of Incident: Approx. ¼ mi. NE of McGregor Point, Maui County, Hawai‘i

I. INTRODUCTION

On September 10, 2013, the *Ocean Odyssey*, a 149-passenger catamaran owned and operated by Sea Sport Cruises, Inc. (“SSC”), ran aground near Ma‘alaea Harbor, Maui, approximately one quarter mile northeast of McGregor Point. The vessel’s two pontoons dragged against the hard substrate as it ran aground, creating two visible scars extending from the shallows (about 5 – 6’ deep) to the shoreline. It is estimated that approximately 20 individual coral colonies were damaged over an area of approximately 47 square meters of poor quality reef.

DAR recommends that the Board of Land and Natural Resources (“Board”) approve the proposed settlement payment from SSC to the State in the amount of \$7,000 as an agreed-upon contribution to be held in trust for the purpose of repairing and maintaining State moorings in Maui County in satisfaction of the damage to natural resources on public lands. Should the Board accept DAR’s recommendation, SSC agrees to waive its rights to contest the essential facts, to accept legal liability for the grounding, and to perform its obligations under the settlement.

II. FACTUAL BACKGROUND

In consideration of the settlement terms recommended by DAR, and for the sole purpose of this settlement agreement for the damage of marine resources, SSC agrees to the following facts and will decline to contest legal liability for the acts of its employees leading to the grounding of its vessel, the *Ocean Odyssey*:

A. Sea Sport Cruises, Inc. owned and controlled the *Ocean Odyssey*

The *Ocean Odyssey*, a 65-foot, 149-passenger catamaran, is owned by Sea Sport Cruises, Inc. (“SSC”). SSC leases the *Ocean Odyssey* to its own wholly owned subsidiary, Leilani Corp., which is the operator and permit holder for the vessel.

In command of the *Ocean Odyssey* on September 10, 2013 was Joshua T. Abrahamsen, a licensed captain. Capt. Abrahamsen was 32 years old at the time of the incident and had been a vessel captain with SSC since January 2010. Immediately after the grounding incident, Capt. Abrahamsen’s employment was terminated.

B. The September 10, 2013 incident

On September 10, 2013, at approximately 4:30 a.m., the *Ocean Odyssey* departed Ma‘alaea Harbor to drydock on Oahu for routine maintenance. Upon departing from Ma‘alaea Harbor, Capt. Abrahamsen set the vessel’s course a ½ turn (~ 2-3 degrees) to starboard at a speed of 16-17 knots. This heading put the vessel on a collision course with the shoreline at McGregor Point. Capt. Abrahamsen was distracted by activities and personnel onboard the vessel which caused him to neglect to steer the vessel properly or to check his heading. Approximately a quarter mile east of McGregor Point, the vessel struck a submerged rock and ran aground.

Due to the south swell and onshore winds that day, the crew determined that there was little they could do without a salvage vessel and experienced salvage team. The crew disembarked the vessel, and the *Ocean Odyssey* was intentionally flooded to minimize movement in the surf overnight. The next day, a salvage team arrived and was able to tow the *Ocean Odyssey* off the reef.

C. Ecological assessments of habitat damage

On September 11, 2013, the day after the incident, SSC staff members Josh Wittmer, Annalea Fink, and Blake Moore surveyed the area where the *Ocean Odyssey* went aground. The team documented two clear scars from the port and starboard pontoons extending from the shoreline throughout the “surge zone”, the area of breaking surf. The substrate in the surge zone consists of old dead pieces of coral rubble, coralline algae, and lava rock. No living coral specimens were found throughout the scarred area within the surge zone.

Beyond the surge zone, in the area referred to as the “shallows”, only one scar from one of the pontoons was visible. In the path of the single scar, zoanthids, coralline algae, *Porites lobata*, and *Pocillopora meandrina* composed the vast majority of the reef structure. It was observed that both the *P. lobata* and *P. meandrina* sustained damage in the scarring area. SSC staff estimated that approximately 20 coral heads were affected by the grounding.

On September 25, 2013, Maui DAR staff accompanied SSC staff to the grounding site to inspect the damage. DAR staff found one prominent scar, but was unable to determine whether the scar had been caused by the initial grounding event or the subsequent salvage operation or both. The length of the grounding scar through the coral shallows was measured at 47 m. The scar extended further shoreward, but the substrate then shifted to uncolonized hard bottom covered with mostly fleshy algae, where no corals were found. It is possible that other damage scars were present in the vicinity, but because of high surf and poor visibility neither DAR nor SSC could locate any other signs of damage.

D. Habitat damage quantification

The coral habitat impacted by the grounding can best be described as poor quality reef. The coral is very patchy and mostly crustose in morphology. Total coral cover in the area is estimated at no more than 10%, although there are some large lobe and cauliflower corals in the area. DAR staff observed two large lobe corals impacted and four cauliflower corals dislodged, but mostly still intact. Observations suggest that SSC’s estimate of 20 impacted coral colonies is a fairly accurate assessment of the damage. A more thorough DAR assessment was not conducted because by the time the sea conditions improved sufficiently to allow for a detailed assessment, turf algae had covered up the damage scars. Therefore it was decided to utilize the SSC assessment which seemed to be a reasonably accurate assessment of the damaged area.

III. LEGAL AUTHORITY FOR ENFORCEMENT

A. Statutory and regulatory protection of live coral

Stony coral is protected by Hawaii Administrative Rules (“HAR”) Title 13, Chapter 95 and by Hawaii Revised Statutes (“HRS”) section 187A-12.5. HAR §13-95-70(a)(1) states in relevant part that “it is unlawful for any person to take, break, or damage any stony coral.”

“Stony coral” is defined as “any invertebrate species belonging to the Order Scleractinia, characterized by having a hard, calcareous skeleton, that are native to the Hawaiian islands.” HAR §13-95-1.

“Break” means “to hit with, or to apply sufficient force to reduce to smaller pieces or to crack without actually separating into pieces.” HAR §13-95-1 (emphasis added).

“Damage” means “to scrape, smother, poison, or otherwise cause any physical or physiological harm to the living portion of a stony coral or live rock.” *Id.* (emphasis added).

B. Administrative fines authorized for violations of HAR Title 13, Chapter 95

HRS §187A-12.5(c) provides the administrative penalties for violations of HAR §13-95-70 and other administrative rules relating to aquatic resources: “(1) For a first violation, a fine of not more than \$1,000; (2) For a second violation within five years of a previous violation, a fine of not more than \$2,000; and (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$3,000.”

HRS §187A-12.5(e) also provides that “[i]n addition to subsection (c), a fine of up to \$1,000 may be levied for each specimen of all other aquatic life taken, killed, or injured in violation of subtitle 5 of title 12 or any rule adopted thereunder.” The definition of “aquatic life” includes coral. *See* HRS §187A-1.

HAR §13-95-2 (b) provides that for colonial stony corals, such as the *P. lobata* and *P. meandrina* colonies damaged in the grounding event, per specimen fines may be imposed on the basis of each damaged head or colony less than one square meter in surface area or, for a colony greater than one square meter in surface area, each square meter of colony surface area and any fraction remaining constituting an additional specimen.

Additionally, HRS §187A-12.5(a) authorizes the Board “to recover administrative fees and costs... or payment for damages or for the cost to correct damages resulting from a violation of” the statutes and rules pertaining to aquatic resources.

C. Settlement authority

Pursuant to HRS §171-7, it is a general duty of the Board to “recover money due the State for damage done to any public lands by wrongful entry and occupation or by wrongful removal therefrom or destruction of any property.” Further, DLNR has inherent authority to accept

moneys for the purpose of implementing its functions.¹ These monies may be placed into a trust fund² and designated for certain purposes, provided that the terms that establish the trust are not illegal.

**IV. APPLICATION OF LAW AND RECOMMENDED SETTLEMENT PURSUANT TO
CIRCUMSTANTIAL FACTORS AND DAR STAFF'S SETTLEMENT DISCUSSIONS WITH THE
RESPONSIBLE PARTY**

A. Maximum authorized fines

HRS §187A-12.5 authorizes an administrative fine of \$1,000 for a first time coral damage violation, as well as an additional \$1,000 per coral specimen injured. Given the estimated 20 coral colony specimens impacted by the *Ocean Odyssey* grounding, the maximum administrative fine authorized in this case would be \$21,000.

HRS §187A-12.5 further authorizes the Board to assess administrative fees and costs, including attorneys' fees relating to a violation of coral protection rules.

B. Factors to be considered in assessing fines

The Board has broad discretion in assessing administrative fines for a natural resource violation. Some of the factors that the Board may take into consideration include the value of the resource damaged, costs for the state to investigate and process the violation, extent of the respondent's cooperation, and voluntary actions taken by the respondent to mitigate or avoid damages.³

DAR staff classified the damaged area as low quality habitat with less than 10% coral cover. In an earlier coral damage case involving anchor damage by the *Kai Kanani* in 2007, the settlement reached by the parties resulted in a fine for comparable low quality reef habitat that equaled approximately \$140/square meter. If we utilize this same unit value, the 47 square meters damaged would have a total habitat value of \$6,580.

The cost for the state to investigate the violation was minimal, thanks to the assistance of SSC staff in conducting initial surveys of the grounding site. DLNR estimates that its administrative costs in responding to this incident totaled approximately \$500.⁴ The cost of processing the violation was also mitigated by SSC's willingness to accept responsibility for the incident and to compensate the state for the resources damaged.

Finally, SSC took prudent measures to mitigate and avoid further coral damage by flooding the vessel to minimize movement of the vessel in the surf while awaiting salvage. SSC also took responsibility for hiring a professional salvage team to remove the *Ocean Odyssey* from the reef.

¹ See AG Opinion No. 92-04

² See HRS §37-62

³ See HAW. ADMIN. R. §13-1-70

⁴ The Maui DAR Education Specialist, Russell Sparks, spent approximately one full day investigating the grounding site and assessing damages. The Maui DAR Monitoring Coordinator spent approximately 4 hours responding to the incident.

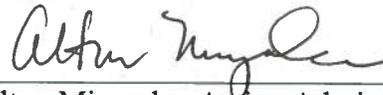
C. Recommended settlement

SSC and the State have agreed to a proposed settlement whereby SSC will make a contribution of \$7,000 to compensate the State for the habitat damaged in the incident and to cover the State's associated administrative costs. The funds will be held in trust for the purpose of repairing and maintaining State moorings in Maui County, which helps to protect coral reef habitat by reducing anchor damage in areas of heavy vessel use. Based on the considerations outlined above, DAR recommends that the Board approve the proposed settlement.

V. RECOMMENDATIONS

1. That the Board find that Sea Sport Cruises, Inc. violated HAR §13-95-70 when its vessel, the *Ocean Odyssey*, ran aground near Ma'alaea Harbor, Maui, on September 10, 2013 and damaged approximately 20 coral specimens;
2. That the Board approve the proposed settlement payment from Sea Sport Cruises, Inc. to the State in the amount of \$7,000 as an agreed-upon contribution to be held in trust for the purpose of repairing and maintaining State moorings in Maui County, to be paid in full within 30 days of the date of this submittal; and
3. That the Board delegate to the Chairperson or her designee its authority to execute all necessary documents to carry out its recommendations under this submittal.

Respectfully Submitted,



Alton Miyasaka, Acting Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson
Department of Land and Natural Resources