

Environment



Hawai'i

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A Fine Tale

In the heyday of the big corporate bailouts last year, the phrase “too big to let fail” was often heard. One can easily imagine the same phrase being tossed around as state and city officials considered what to do with the troubled Waimanalo Gulch landfill, O’ahu’s only repository for municipal solid waste.

Shut it down, because of the myriad violations?

Impose meaningful fines?

Make it march smartly on the path to compliance?

No one at the regulatory level seems to have had much stomach for any of these approaches. Instead, the state Department of Health doles out wet-noodle lashes, the Environmental Protection Agency is negotiating with operators out of public view, and no one seems to take seriously the notion that the known violations pose a risk to the health and welfare of people living on the Wai’anae Coast.

Also in this issue: We recap the environmental highlights of the 2010 legislative session, review the recent Jerry Springer (excuse us, Wespac) show, and report on highlights of recent Land Use Commission hearings on two Big Island developments.

Waimanalo Gulch Operators Contest Fine Despite Leniency of Department of Health

The owner and operator of O’ahu’s Waimanalo Gulch Sanitary Landfill are contesting their \$424,000 fine, levied May 13 by the state Department of Health (DOH). The fine was imposed for several infractions, including the use of a wrong type of liner under one of its berms, construction of a berm wall that was too high, and the failure to report its violations to the department in a timely manner — two years and eight months late, to be precise.

The DOH has called the violations inexcusable and disturbing. But in news reports, the landfill’s operator, Waste Management Hawai’i, Inc. (WMH), has argued that the fine is excessive and “disproportionate to the alleged violation.”

A review of DOH records suggests that the violations grew out of a persistent lack of attention to detail by WMH to its permit application and prior permit terms for Waimanalo Gulch. And in the case of the most recent violation, the company’s apparent deceit, combined with a rather lenient DOH, allowed the landfill to continue operating for two and a half years when it could have been shut down.

Broken down, the DOH fine averages less than \$500 a day over the total period the violations were occurring. The department has the ability to impose fines of up to \$10,000 per day per violation. Although the City and County of Honolulu owns the landfill, its operating contract with WMH requires the company to pay all fines.

Thin Ice

Under the state’s law regarding solid waste pollution (Hawai’i Revised Statutes, Chapter 342H), no one can operate or construct a municipal solid waste landfill without a solid waste permit from the DOH. So in the fall of 2007, with their permit set to expire at the end of April 2008, WMH and the city jointly submitted a renewal application for five more years. Although it was common knowledge at the time that the city planned to enlarge the landfill area by 92.5 acres to add some 15 years of capacity, the application contained no information about the proposed expansion.

Over the next several months, the DOH prodded the city and WMH to update some of the major documents that had been submitted as part of the application, which was eventually amended to reflect the proposed expansion. Because the city’s Special Use Permit from the state Land Use Commission — which allows the landfill to operate in the Agriculture District — was also set to expire in the spring of 2008, the DOH could not accept the solid waste permit application as complete until the LUC approved the site for future use as a landfill, which did not happen until late last year.

With the permit about to expire in a couple of weeks, the DOH notified the city and WMH on April 16, 2008

to page 7

IN THIS ISSUE

2

New & Noteworthy

3

O’oma Wins Support of Planning Office

5

2010 Legislative Highlights

10

Open Hostility Among Members Apparent in Recent Wespac Meeting



The Waimanalo Gulch Sanitary Landfill.

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NEW AND NOTEWORTHY

Another Setback for Irradiator: The Nuclear Regulatory Commission has sided with a citizens' group in Honolulu, determining that the public should have the opportunity to comment on a revised environmental assessment for the fruit irradiation facility proposed by Pa'ina Hawai'i, LLC. The irradiator, which would use Cobalt-60 to treat Hawai'i-grown fruit for export, had been proposed for land at Honolulu International Airport. Earlier this year, Pa'ina Hawai'i had suggested other sites be considered as well.

The commission also agreed with Concerned Citizens of Honolulu that NRC staff violated the National Environmental Policy Act by not including in its environmental assessment consideration of alternative means of meeting export quarantine requirements, including electron-beam irradiation, which has been used for the last decade on Hawai'i island.

In a ruling that pretty much was a wipeout for Pa'ina Hawai'i, the NRC upheld a decision by the Atomic Safety and Licensing Board (ASLB) that criticized NRC staff for not looking at alternative sites.

Finally, it ordered the ASLB to rule on Concerned Citizens' claim that NRC staff illegally ignored risks to public health and safety that could occur from accidents involving transportation of the Cobalt-60 sources. On July 16, the ASLB ordered such an analysis to be included in the revised EA.

Find a link to the NRC's order on our website, www.environment-hawaii.org.

Na Wai 'Eha Appeal: The state Commission on Water Resource Management has been put on notice that its decision in the case involving Na Wai 'Eha (four central Maui streams) will be appealed. Hui o Na Wai 'Eha and Maui Tomorrow Foundation, the two groups that had sought substantial restoration of stream flows, are being represented by Earthjustice attorney Isaac Moriwake.

"The commission failed the public trust and violated the Hawai'i Constitution and Water Code, and we look forward to our day in court," Irene Bowie, executive director of Maui Tomorrow, said in a press release announcing the appeal.

The decision was the subject of extensive reporting in last month's issue of *Environment Hawai'i*.

Coincidence? DLNR Submits Exemption Lists:

One month after our report on its exemption list debacle (see the June issue of *Environment Hawai'i*), the state Department of Land and Natural Resources has submitted to the state Office of Environmental Quality Control proposed exemption lists for its Division of Aquatic Resources (DAR), Division of State Parks, Division of Forestry and Wildlife (DOFAW), Division of Boating and Ocean Recreation, as well as a department-wide list.

DAR's proposed list appears to exempt every type of permit and license issued by the division. The list under Exemption Class #10, regarding administrative activities, would exempt everything from special activity permits to live rock and coral collecting permits, and all permits for the Papahānaumokuākea Marine National Monument, a fact that has not escaped the notice of local environmental groups, according to Marti Townsend, program director for KAHEA: the Hawaiian-Environmental Alliance, which is suing the DLNR for its handling of those permits. She says she is working on a response to the proposed lists for DAR and the DLNR, but is not sure whether the state Environmental Council will even meet to approve it. The council, in protest of the current administration's lack of logistical and financial support, has not met since last summer. The term of its last chair, Gail Grabowski, ended June 30.

DOFAW's list is a bit more focused, and proposes, among other things, increasing the acreage of exempt management-related fencing from 10 acres to 100 acres/two miles, and research-related fencing from one acre to 10 acres. The list would also exempt invasive species control using traps, toxicants, herbicides, pesticides, and fungicides, as well as the installation of monitoring equipment to measure environmental factors, including weather and water quality.

The online version of the July 8 OEQC *Environmental Notice* includes links to the proposed exemption lists: [oeqc.doh.hawaii.gov/Shared%20Documents/Environmental Notice/Archives/2010s/2010-07-08.pdf](http://oeqc.doh.hawaii.gov/Shared%20Documents/Environmental%20Notice/Archives/2010s/2010-07-08.pdf).

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Quote of the Month

*"I don't care what OHA has to say,
what the state of Hawai'i has to say...
I don't care what kind of
management plan you have."*

**— Manny Duenas, WESPAC,
on the Papahānaumokuākea
Marine National Monument**

With Conditions, O'oma Development Wins Support of State Planning Office

A proposal to develop land near the southern end of the Keahole airport into a mixed residential and commercial development appears to have moved a giant step closer to approval now that the state Department of Transportation and the developer have come to an agreement.

DOT administrator Brennon Morioka informed the Land Use Commission of the agreement on July 15, when the LUC met in Kona to close up the evidentiary portion of the hearing on the petition submitted by Dennis Maresco and his company, Midland Pacific Homes, for a project known as O'oma Beachside Villages. Plans call for between 950 and 1,200 residences (about half of them single-family homes) and two commercial centers on some 300 acres seven miles north of the village of Kona. Some of the land (near the Queen Ka'ahumanu Highway) is already in the Urban land use district; another 75 acres along the shore would be kept in Conservation. The land that is the subject of the LUC docket comes to roughly 181 acres.

One of the biggest obstacles to approval has been concern over the noise from landing and departing planes. Morioka was firm in pointing out his department's position is neutral with respect to whether the LUC should approve the project. It is neither supportive nor opposed, but is taking instead a position of "no objection" to the project moving forward, he told the commissioners.

His department had had concerns, he said, both from the standpoint of protecting the ability of the Kona airport to continue operating into the future despite encroaching development and from the standpoint of the increasing vehicular traffic on the primary arterial road along the Kona Coast, the Queen Ka'ahumanu Highway.

The "no objection" position was tied to a series of conditions that had been worked out between the developer and the DOT in talks extending back for a couple of years, Morioka said. "One of the conditions we ask for is that an avigation easement be placed" on the land, he said. "This is very important to us; it will release and indemnify the state from many of the issues common to airport operations," including noise, fumes, and other potential nuisances.

The agreement also calls for all housing units where the noise exposure levels are 55 DNL or higher to be mitigated by the developer, with no units to be built in areas where the noise exposure is expected to be greater than 60 DNL. (DNL refers to a 24-hour average noise exposure, expressed in decibels, with nighttime sound receiving a slightly higher weight than daytime noise.)

To ensure that the conditions are followed, the DOT is requiring all subdivision and design plans be submitted to the DOT for approval. "We want to ensure the operations of the airport are not negatively impacted," Morioka said. "Neither the DOT nor the FAA [Federal Aviation Administration] will participate in any form of mitigation with respect to noise, both in the near term or long term," no matter how the airport master plan may change or airport development may play out.

As far as road traffic goes, "we expect the petitioner will submit and get approval from the Department of Transportation on a traffic impact analysis report (TIAR) that will identify all impacts, mitigation efforts, as well as determine what its pro-rata share of development will be in paying for these mitigations." The TIAR is also to be updated regularly by the developer, at least every five years.

Access to the development off Queen Ka'ahumanu will be restricted to vehicles heading south, which can enter the main access road by means of a right turn. North-bound travelers heading toward the site will have to make a U-turn at some point north of the turn-off, then backtrack. Travelers wanting to head north when leaving the development will not be able to turn left, but must instead travel south on Queen Ka'ahumanu until they reach a point where a legal U-turn is possible. This right-in, right-out pattern, as it is called, is only an interim measure. In the long term, Morioka said, "Queen Ka'ahumanu Highway is considered restricted access. . . We will be closing down all access and going to grade-separated access at selected locations." After that, access to O'oma will be by means of a planned makai roadway running from the airport south to near Kailua village, with limited access to Queen Ka'ahumanu. To ensure that homeowners are aware of this, one of the DOT's conditions is disclosure of the eventual termination of direct Queen Ka'ahumanu access.

With the DOT adopting that stance, the state Office of Planning, automatically one of the parties to every petition for a boundary amendment, shifted its position to one of affirmative support.

Abbey Seth Mayer, director of the OP, said his agency's support was based on conditions that protect the interests both of the airport and of the Natural Energy Laboratory of Hawai'i Authority (NELHA), which lies directly north of the O'oma parcel. These are, he said, "key conditions . . . absolutely mandatory for approval.

"We're leaving it basically to the developer to take the risk," he continued. "If they're going to be able to provide a product where the public's going to want to live, that's their risk. If the noise is too great and they can't get the prices they need, that's their risk."

A second concern of the state was the impact of the development on NELHA, which, Mayer noted, depends on pristine surface and deep water, and which also needs to be able to develop its property without fear future neighbors will consider it a nuisance.

NELHA's ongoing activities, Mayer said, "will continue to produce dust, odor noise, solar reflections, wastewater into injection wells. It could impact O'oma." To mitigate against this, the Office of Planning was proposing that O'oma accept a 100-foot buffer on its boundary with NELHA, in which no development would occur. Also, to allow NELHA to continue to use injection wells, O'oma was to agree not to put any well that might be a source for potable, desalinated



DOT director Brennon Morioka testifying at a recent LUC hearing. Commissioner Thomas Contrades is in the background.

water within a quarter mile of the NELHA boundary.

Finally, Mayer addressed the issues of compliance and enforcement—areas that the commission has been grappling with for years in the case of the 'Aina Le'a development just up the road from O'oma. Mayer proposed that the commission include as part of its approval a condition “requesting an automatic order to show cause” in the event that conditions are not met. The show-cause order refers to a demand that the developer show cause why the land should not revert to its pre-petition status.

“Part of our consideration on this,” Mayer explained, is that in this case, “you have potentially incompatible land uses related to both the airport and NELHA.” He wanted to make sure, he said, “that the petitioner is actually going to develop—and not simply entitle it, take the uptick in value, and use that to swap or sell” the property. “So in ensuring that the developer will develop the product as stated in its representations, we feel the automatic order to show cause puts the burden on the developer and takes it off the public and state.... If it appears that they [the developer] are not going to be able to meet a ten-year deadline [for completion of backbone infrastructure], it puts the burden on them to come back in.”

The next step in the process is the drafting of proposed findings and decisions by each of the parties. The commission will take those up at its next hearing on O'oma, a date for which has not yet been scheduled.



'Aina Le'a Faces Compliance Hearing

Once more, the state Land Use Commission has put the developer of the project known as the Villages of 'Aina Le'a on notice that its progress toward a critical deadline is unsatisfactory.

In 2005, the LUC imposed a November 17, 2010, deadline for construction of 385 units of affordable housing on the site. Although the 1,060-acre parcel had been placed in the Urban district in 1989, the land, which had changed hands several times already, was still undeveloped in 2005. The owner at the time, a subsidiary of Bridge Capital, stated that the affordable housing would be up within three years, but the LUC allowed a full five years for the build-out.

Since then, Bridge is ostensibly out of the picture. A new developer, DW 'Aina Le'a (DWAL), came forward last year after the

LUC was so put out with Bridge that it was poised to have the land revert to the Agriculture District. The LUC relented on its order to show cause why the land should not revert, allowing DWAL to exercise its best effort to comply with the development conditions. To show its seriousness of intent, DWAL was required

to complete 16 affordable units by March 31.

But at a meeting on July 1, commissioners were obviously disturbed by some of the statements made by DWAL's principal, Robert Wessels, concerning progress toward the November deadline and compliance with the interim condition.

Regarding the interim condition, Wessels and his attorney, Alan Okamoto, argued that even though there were no paved roads, electricity came from a portable generator, water from a tank, and sewage was sent to an unpermitted leach field, the units still met the definition of complete since, as Okamoto stated, the buildings “can be hooked up as soon as the utilities are ready.”

Another issue concerned financing, especially as it related to DWAL's ability to finish work on the affordable units by mid-November. The chief contractor on site, Goodfellow Bros., had not been paid for several months and, according to Wessels, work on the site had pretty much been on hold for “about 60 days,” as of July 1. The problem was capital—or lack thereof. Goodfellow, the principal infrastructure contractor, was not working and, in fact, had extended a \$5.5 million loan to DWAL, Wessels said. (The same day of the LUC meeting, *West Hawai'i Today* reported that a company that poured foundations for the affordable housing buildings was owed more than \$300,000 by DWAL while a drywall contractor had yet to be paid for his work.)

Wessels acknowledged that financing had been problematic, causing delays in work as well as preventing his company from taking title to the land, more than 90 percent of which continues to be owned by Bridge 'Aina Le'a. Last year, Wessels had told the LUC he would be taking ownership by October 2009.

Deputy attorney general Bryan Yee, representing the Office of Planning, pressed Wessels on this issue. Wessels acknowledged that a shortage of capital had resulted in reworking the agreement of sale with



The view to the west from the mauka portion of land proposed for development by Bridge 'Aina Le'a.

PHOTO: HAWAII COUNTY DEPARTMENT OF PUBLIC WORKS

Bridge, so that now the deadline for purchasing full title to the Urban land was pushed back to October 2010. What was Wessels doing to get the money to close the deal? Yee asked.

“When one lender didn't perform,” Wessels said, “we got the Ex-Im Bank to loan us \$98 million, including \$12 million to release the balance of the residential land. We have a firm commitment and will close in 45 days.”

Capital Asia, the Singapore-based group that was providing financing by selling undivided shares in the 62-acre parcel DWAL does own (where the affordable units are to be built), was providing a steady stream of capital, he said, just at a rate slower than what is required. “We need \$120 million for all the affordable units alone,” Wessels said. (At present, the number of individual owners of the 62 acres is approaching 400, each one representing an investment of at least \$96,000.)

Although the final environmental impact statement for the entire project has not yet been released or accepted by the county, and notice of acceptance probably won't be published until September at the earliest, Wessels said he was planning to obtain approval for sale of condo units within 30 to 45 days, with closing in October or November. “We hope to get this before the EIS is accepted,” he said. “We want to start sales before the EIS is complete.”

Other conditions of the development were proving difficult as well. The intersection with Queen Ka'ahumanu Highway needs to be improved before the affordable units can be occupied. But improvements cannot be begun until a final EIS is in hand and the Department of Transportation approves the plans. A sewage treatment plant needs to be up and running before occupancy can occur, but again, the EIS needs to be completed and plans have to be approved by the Department of Health.

Wessels told the commissioners he was

Increase in Barrel Tax Highlight Of 2010 Environmental Measures

When it comes to environmental measures, the number passed by the Hawai'i Legislature in 2010 was not huge. However, several of the bills passed have far-ranging consequences.

Almost certainly, the most consequential measure is Act 73, which increases to \$1.05 the tax on each barrel of "petroleum product" (excluding aviation fuel) distributed to retailers, from the current tax of 5 cents. The bill passed both chambers on April 14. On April 25, it was returned to the Legislature along with Governor Linda Lingle's veto message. Four days later, both the Senate and the House voted to override the veto, and House Bill 2421 became law.

The act renames the existing tax, known as the environmental response tax, the environmental response, energy, and food security tax. Money raised by the tax – some \$22 million a year – will continue to support the state's oil-spill response fund (at the current 5-cent level) and will also be deposited into the existing energy security special fund (15 cents), the existing energy systems development spe-

cial fund at the University of Hawai'i (10 cents), and a new agricultural development and food security special fund (15 cents). The remainder will go into the general fund. Allocation of the tax is to be reviewed legislatively each year until the tax expires (2015).

More specifically:

- ◆ The cap of \$20 million on the environmental response revolving fund is lifted. Previously, when the cap was reached, the tax was no longer to be collected. In addition to addressing oil spill response capabilities and planning and helping to pay for used-oil recycling programs in the counties, the fund may also now be used to "support environmental protection and natural resource protection programs." These are described in broad terms to include development of alternative energy and concerns related to global warming, air quality, clean water, and polluted runoff, among other things.

- ◆ The new agricultural development and food security special fund is to support grants to farmers, help in acquisition of agricultural property and irrigation systems, assist in de-

velopment of production or processing capacity, and help finance any other activity "that may lead to reduced importation of food, fodder, or feed from outside the state."

- ◆ The scope of purposes for which the existing energy security special fund may be used was expanded. It may now help support the Department of Business, Economic Development, and Tourism's Hawai'i Clean Energy Initiative (including DBEDT staff positions) and can underwrite, "to the extent possible," the state's Greenhouse Gas Emissions Reduction Task Force and Climate Change Task Force. It can also be used to help counties with grants intended to promote objectives of the Hawai'i Clean Energy Initiative.

- ◆ The purpose of the energy systems development special fund is unchanged. That fund, which was established in 2007 and is set to expire in 2012, is to be used by the university's Hawai'i Natural Energy Institute to demonstrate renewable energy sources, help develop and deploy technologies to reduce imported oil demand, and coordinate research projects, among other things. (The first assessment of how that fund is being used is due later this year.)

The measure also establishes the Hawai'i Economic Development Task Force within DBEDT to promote renewable-energy

hoping to process permits for the sewage treatment plan concurrent with completion of the EIS. In addition, because the plant is proposed to be built outside the Urban area, the county Planning Commission would have to approve a special permit.

Despite the daunting prospects, Wessels did not ask the commission for any time extension. In correspondence with the LUC, however, Okamoto had stated that "there will be situations which [DWAL] would like to address with the commission to see if some reasonable changes can be made" in the timetable.

"Will you be requesting an extension?" Yee asked Wessels.

"We haven't found a way around some delays," Wessels replied. "We intend to advise the commission where we stand... We're notifying the commission we have hurdles."

A Deadline, Not a Goal

The Office of Planning had seven concerns, listed by Yee:

- ◆ The March 31 deadline for 16 complete houses had not been met. "Can you live in these homes?" he asked rhetorically. "No."

- ◆ The EIS was way behind schedule; so far behind, in fact, that the November deadline for completion of affordable houses cannot be met, Yee said.

- ◆ There was the slowdown. "Any slowdown makes November impossible," he noted.

- ◆ The Office of Planning submitted to the commission an ad by Capital Asia, the group selling the undivided shares in the land, which included terms suggesting the investment was guaranteed, he said, adding, "The county was convinced the financing was secure, but we know now that was inadequate."

- ◆ In violation of the condition to notify the commission of changes in land ownership, Yee said, the LUC had been given no notice of the more than 300 owners of the affordable parcel.

- ◆ There was the ongoing involvement of Bridge, Yee said. "The deal [sale of the land] should have closed last October 9, but DW didn't have the money to pay," he said.

- ◆ Finally, the November 17 deadline "is a requirement, not a goal. I urge you to keep this. It is important to hold them to this," he said.

Okamoto pleaded for his client, asking

the commission "to consider we're dealing with an area that's been in play a long time. It makes all the sense in the world to keep this area urban... Construction is on the ground. No conventional financing is available. Mr. Wessels is prepared to put up buildings that are going to be vacant. It does make sense to allow this property to be developed so it can meet its part in the area."

OP director Mayer was not swayed. "We've spent an incredible amount of time, effort and taxpayer money... If we are not able to hold the petitioners to the conditions we set, then what we do here in my mind loses all meaning. We need a new petitioner, a bona fide landowner and developer."

LUC member Vladimir Devens made a motion to keep the show-cause order alive; to have another status hearing before the November deadline; to reaffirm that the November deadline was not a goal but a deadline, with copies of certificates of occupancy to be issued by that time for all affordable units; and, finally, to determine that the March 31 deadline for 16 affordable units had not been met. The motion passed, with all eight commissioners present voting in favor. — *Patricia Tummons*

projects, energy efficiency, and development of agricultural infrastructure in keeping with the measure's purpose.

Although tax increases are generally unpopular, testimony submitted to the Legislature by members of the public on this bill was generally supportive. Much of it was generated by conservation groups, including the Nature Conservancy of Hawai'i, the Sierra Club, which urged that the proposed tax be set at \$5 a barrel, and the Conservation Council for Hawai'i. The Hawai'i Farm Bureau, the Chamber of Commerce of Hawai'i, and En-

“What is going to be done to prevent this from happening again?” — Marjorie Ziegler, CCH

terprise Honolulu (the O'ahu Economic Development Board) were also among those supporting the bill.

Strongly opposed were the Lingle administration's cabinet officers. Chiyome Fukino, director of the Department of Health, for example, expressed concerns that the bill would actually diminish funds available for oil-spill response planning and preparedness should the measure cause people to consume less fuel. Also opposed (though not initially) was Life of the Land, a group that has embraced the adoption of energy conservation and renewable energy among its primary purposes. Initially it testified in support but later changed its position, objecting to the apparent endorsement in the measure of an undersea cable transmission line and development of a “smart grid” for distributing electrical power and seeking to have coal and palm oil, ethanol, and other imported fuels derived from potential food crops subject to the tax.

Not surprisingly, the Tax Foundation of Hawai'i weighed in also, in opposition to the bill – even in opposition to the very notion of the barrel tax. The enactment of the barrel tax, it fulminated, represented “the classic effort of getting one's foot in the door with a palatable and acceptable tax rate with the possibility of increasing the tax rate once it is enacted which is what is being proposed by this measure... Proponents ought to be ashamed that they are promoting a less than transparent tax increase in the burden on families all in the name of environmental protection and food security.” Instead, it recommended that all programs to be financed out of the increased tax should simply be paid for with general funds.

Invasive Species: Act 128 is intended to make enforcement of the state's quarantine laws a little easier by reducing penalties for minor infractions (first-time violators face fines of

between \$50 and \$5,000), while imposing harsher penalties for parties who intentionally spread prohibited or restricted animals or plants.

Quarantine Fee Exemptions: The Legislature approved and the governor signed a measure, now Act 173, that exempts certain bulk freight shipments from the inspection, quarantine, and eradication service fee.

The Conservation Council for Hawai'i was the only environmental non-profit objecting to the bill throughout the session.

CCH executive director Marjorie Ziegler noted that spiders were found in aggregate – one of the exempt commodities – shipped from China last year. “What is going to be done to prevent this from happening again?” she wrote in her testimony.

Also opposed to the measure was the Subcontractors Association of Hawai'i, whose testimony pointed out that when the fee was adopted, “it was our understanding that it was in order to offset fees for inspections of containers against the intrusion of invasive species. Why cement would be exempt and not containers full of prepackaged pesticides or roofing material or drywall material or other items when invasive species also have no interest in ‘hitching a ride’ in those containers, we have no idea.” However, the group continued, “we do know that we think it is inherently unfair to start exempting certain types of materials without looking at all materials that perhaps ought to be exempt.”

Beach Transit Corridors: Act 160 (House Bill 1801) adds a new section to Chapter 115 of Hawai'i Revised Statutes, which deals with

“Any time you catch a shark, you're in possession of its fins.” — Sean Martin, WESPAC

the public's right to beach access. The new law authorizes the Department of Land and Natural Resources to “maintain access within beach transit corridors” by requiring private property owners to keep such corridors adjacent to their land free from “the landowner's human-induced, enhanced, or unmaintained vegetation that interferes or encroaches in the beach transit corridors.”

As the bill passed through the Senate, language that addressed vegetation deliberately planted to encroach on the beach was removed from the bill, sparking a flood of public protest. Addressing such encroachments had been one of the motivating forces

behind the legislation. By the time the bill was moved out of conference, the language was restored.

Monk Seals: Recent killings of monk seals have highlighted the slap-on-the-wrist penalty provisions for knowingly harming these perilously endangered creatures. Act 165 is intended to correct that by making the intentional taking or killing of a monk seal a Class C felony, with the range of penalties that entails, and may be subject to a fine of up to \$50,000.

Shark Protections: The Legislature passed out two bills intended to protect sharks: House Bill 2853 would have banned the feeding of sharks in state waters; Senate Bill 2169 – now Act 148 – bans the sale, possession, and distribution of dried shark fins.

The first of these would have had a chilling effect on the shark-tour operations off the North Shore of O'ahu. Typically, these involve chumming for sharks, then putting visitors into shark cages dropped into the water, where they can see the sharks milling about for the bait. In her notice of veto, Lingle stated that the measure violated the state Constitution by addressing subjects broader than those contained in the bill's title (“Relating to Impounded Vessels”).

Act 148 is intended to stop the trade in shark fins, whose take can be cruel and wasteful, involving the removal of fins and tails from animals that are then tossed back to sea. Federal law and the pre-existing state law have attempted to stop this practice by requiring that any dried shark fins brought to port have to be able to be matched up with whole shark carcasses. The new law goes further, however, bulking up penalties for violators and addressing the sale and use of shark fins in Asian cuisine. Under the new law, restaurants hav-

ing existing stocks at the time the law became effective (July 1) are given one year to use up those stocks. First-time violators face a fine of up to \$15,000. Repeat violators may be fined up to \$35,000 and face forfeiture of any fins, commercial marine licenses, vessels, fishing equipment, or other property involved in the violation. Third-time offenders face a fine of up to \$50,000, forfeiture of property, and imprisonment of up to a year.

At the recent meeting of the Western Pacific Fishery Management Council, the shark-fin ban was the subject of much uninformed discussion. The short law – a copy of which was distributed – clearly states that the

term “shark fin” refers to the “raw or dried fin or tail of the shark.” Yet council members professed to be confused, asking what would happen if they were to land a shark carcass still bearing its fins. “It doesn’t matter if it’s attached or unattached to shark,” said council member Sean Martin. “Any time you catch a shark, you’re in possession of its fins... We’ll need some clarification for the industry to understand what is allowed.”

Laura Thielen, a voting council member representing the state of Hawai'i, agreed. “We had asked the Legislature to provide clarifying language,” she said. “We recognize finning may be banned, but shipments may not be.” Further, she said, the law may interfere with the commerce clause of the U.S. Constitution.



Budget Information For 2009 Still Not Available

In setting budgets, knowing what agencies spent in past years is one of the most critical pieces of information. However, on this point, the Lingle administration’s Department of Budget and Finance has fallen behind schedule. As a result, neither the legislators nor members of the public have been provided with complete information for any fiscal year since the completion of the 2008 fiscal year (June 30, 2008).

By law, Budget and Finance is supposed to deliver a so-called Variance Report to the Legislature by November 30 of each year. This report is to contain the complete record of expenditures for the previous fiscal year as well as each agency’s expenses for the first three months of the current year (through September 30), and compare those figures

with budgeted amounts. The idea is to allow legislators and other interested parties to see how expenses stack up against budgets so that in the next legislative session, whatever adjustments may be called for can be made.

The last Variance Report posted is up-to-date as of September 30, 2008.

Since November 30, 2009, *Environment Hawai'i* has made frequent calls to the Budget and Finance office, asking when the Variance Report for Fiscal Year 2009 will be published. Time and again we were told to expect it “within a few weeks.”

Without the report, it is impossible to know how much agencies actually spent in FY 2009 and to compare that against the amounts they were given in their budget. The task of understanding where state taxpayer dollars go – challenging under the very best of circumstances – becomes impossible.

In the case of the Department of Land and Natural Resources, until 2009, the annual operations budget had been increasing slowly,

to the point that it stood around \$111 million. A year earlier, the budget had been \$107.6 million, but actual expenditures fell below that by 9 percent (\$98.3 million). How much of the 2009 allotment remained unspent has not been publicly disclosed.

What is known is that the budget for the 2010 fiscal year was pared back to \$104 million, while that for 2011 has been further reduced to \$98.7 million.

If the budgets of the Division of Boating and Ocean Recreation and the Bureau of Conveyances are dropped out of that total (neither division has much to do with managing natural resources; their place in the department is explained more by historical fluke than anything else), the DLNR’s budget drops to \$82.4 million for fiscal 2010 and \$77.6 million for the current fiscal year. The average cutback for each division comes to just over 6 percent. The number of permanent full-time positions was also cut: from 767 in FY 2010 to 739 in FY 2011 (4 percent). — *P.T.*

DLNR Budget	FY 2010	FY 2011	Difference
Land Management	12,440,189	12,109,321	330,868
CWRM	2,821,755	2,581,219	240,536
DOCARE	8,883,237	8,044,145	839,092
DOBOR	17,580,988	17,232,963	348,025
DOFAW	29,276,559	28,340,522	936,037
DAR	9,053,002	8,388,026	664,976
Bureau	4,317,693	3,851,598	466,095
Historic Preservation	1,682,680	1,428,517	254,163
State Parks	12,739,581	11,635,287	1,104,294
Engineering	2,957,252	2,829,029	128,223
Administration	2,548,727	2,272,201	276,526
Total	104,301,663	98,712,828	5,588,835

Waimanalo from page 1

that they would be allowed to continue operating the landfill while their renewal application was pending. Under HRS Chapter 342H-4(e), the DOH wrote, “No application for a modification or renewal of a permit shall be held in violation of this chapter during the pendency of the applicant’s application provided that the applicant acts consistently with the permit previously granted, the application, and all plans, specifications, and other information submitted as a part thereof.”

Within a few months of that letter, however, the city and WMH appear to have committed a violation. In a September 5 warning letter, DOH Solid Waste Branch

chief Steven Chang pointed out several potential violations of terms of their expired permit (which continued to govern their operations): specifically, conditions regarding material storage, use of a screener without DOH permission, failure to properly control their leachate system, and failure to notify the DOH about excessive methane gas and monitoring results in a timely manner.

In a response letter, WMH operations manager Joseph Whelan attributed the apparent stockpiling violations to a misunderstanding between the company and DOH. He added that the other violations had already been addressed or were in the process of being resolved. While Chang stated in his response that he disagreed with Whelan’s characterization of the possible stockpiling

violations, the DOH chose not to issue an official Notice and Finding of Violation/Order.

Less than a year earlier, the DOH had settled an April 2006 violation case against the city and WMH that originally proposed a \$2.8 million fine for 18 violations at Waimanalo Gulch, including overfilling and unauthorized material storage. WMH was eventually allowed to pay \$1.5 million in cash or \$520,000 in cash plus the completion of \$637,500 worth of supplemental environmental projects and the expenditure of at least \$342,500 towards the design and construction of a residential community drop-off center at the landfill.

Also in April 2006, the EPA issued Notice and Finding of Violation to the city and

WMH for violating the Clean Air Act, “based on alleged failure to submit certain reports and design plans required by the EPA, and the failure to begin and timely complete the installation of a gas collection and control system for the Waimanalo Gulch Sanitary Landfill on O‘ahu,” according to an April 2010 filing by WMH with the Securities and Exchange Commission. EPA inspectors found that the gas collection and control system was installed seven years late and did not meet clean-air requirements. The NFOV did not propose a penalty amount and the parties have been in confidential settlement negotiations, the SEC report states, adding that the

“[Y]our application package... has become largely unmanageable, not to mention obsolete and inconsistent.” — Steven Chang, DOH

company has a reasonable belief that sanctions could exceed \$100,000. (The EPA has the ability to impose fines of up to \$32,500 per violation per day for Clean Air Act violations.)

Whether any more possible violations exist is unknown since the DOH did not make WMH’s 2009 annual operating report (which would detail any overfilling that might have occurred) or any recent inspection reports available to *Environment Hawai'i* for review.

Filling Gaps

On September 24, 2009, in a 5-3 vote, the LUC approved a new Special Use Permit to the city for Waimanalo Gulch on the condition that it stop receiving municipal solid waste on July 31, 2012. The permit did allow ash and residue (non-combustible material sorted pre-incineration) from the city’s H-Power waste-to-energy plant to be landfilled until the gulch reached capacity. The city, which had been planning to use the landfill for municipal solid waste for much longer than that, appealed the decision in First Circuit Court on November 19, as did landfill opponents state Rep. Maile Shimabukuro, state Sen. Colleen Hanabusa, and the Ko Olina Community Association.

With a land entitlement in place, the city and WMH turned their attention to their solid waste permit application. After a meeting with DOH staff on October 13 to discuss the application, Whelan wrote the DOH on November 3 requesting confirmation that his company was allowed to continue landfill operations while the solid waste permit was pending. He specifically asked the DOH to confirm that the company could use existing municipal solid waste and ash cells, move three culturally significant stone uprights out

of the expansion area, construct an access road to the stones, and excavate proposed expansion cells and stormwater management improvements. That same day, WMH and the city also submitted a revised permit application.

In a December 2 letter to Whelan and city Department of Environmental Services director Timothy Steinberger, Chang informed them that their application was far from complete.

He wrote, “During our [October] meeting, we noted that your application package has so many design changes and unresolved questions that it has become largely unman-

ageable, not to mention obsolete and inconsistent. As such, we requested that you resubmit your entire package to reflect the landfill design you intend to pursue, thereby superseding all previous submissions.”

He continued that their November 2 submission did not address all of the DOH’s concerns and “is not considered a new application as discussed in our meeting. What’s more, he wrote, “Review of the permit drawings revealed that these drawings lack the details required to construct the cells, and, therefore, do not provide enough information to allow the DOH to determine adequacy with respect to environmental issues and state requirements for landfills...”

Chang listed 11 design-related deficiencies within the documents that had been submitted by late 2009, including the lack of a construction quality assurance (CQA) report for a berm that had been constructed in 2006 and 2007 to stabilize part of its ash monofill that had been overfilled in places.

“The lack of the CQA for the West Berm does not allow DOH to review the construction of the berm, including the MSW [municipal solid waste] cover layer beneath the berm and liner tie-ins. DOH requests that submittal of the CQA be packaged to reflect work done to date and submitted within 30 days of this letter...DOH

will hold issuance of a permit for the landfill expansion in abeyance pending the receipt and review of the new application and associated documents and drawings,” Chang wrote.

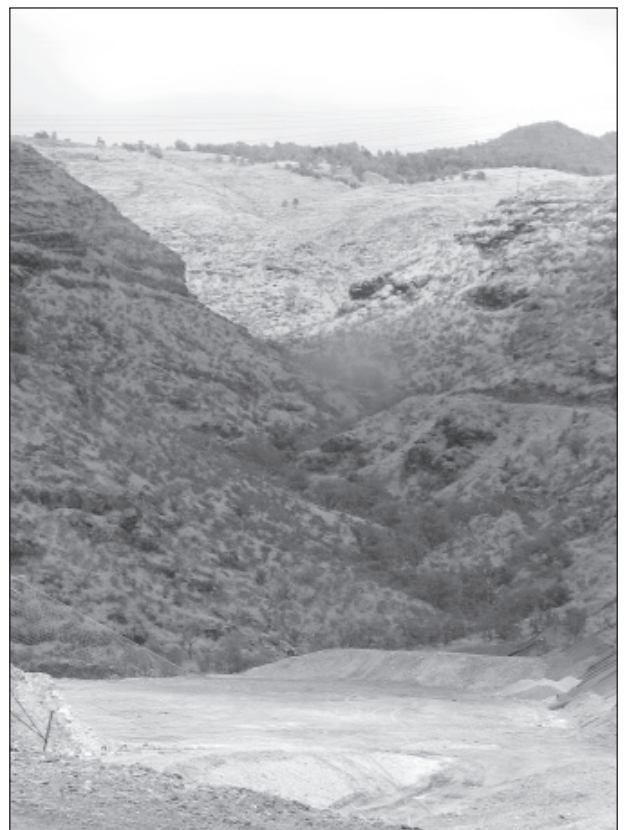
In response, the city and WMH submitted a new landfill modification/renewal application on December 14. They did not submit the requested CQA report, prepared by AECOM Technical Services, Inc., until February 3.

A Buried Secret

CQA reports, prepared by third-party contractors to determine whether final construction of an improvement complies with the approved design, are commonly submitted about a month after construction is complete. But in the case of the west berm, WMH submitted the CQA only after the DOH threatened to withhold permit approval.

The three-inch-thick CQA report does not begin noting construction deficiencies, but buries it on the very last page, which is an email exchange between a Waste Management engineer and engineers with the company that designed the berm.

The January 22, 2010, email from Fabrizio Settepani of Geosyntec Consultants, Inc., to Waste Management’s Jesse Frey includes the contents of a May 11, 2007 email. That email, in turn, from Geosyntec engineer Hari



The City and County of Honolulu and Waste Management Hawai'i plan to blast out and excavate the back of Waimanalo Gulch (pictured here) to provide an estimated 15 more years of life to the city's landfill.

Sharma to Frey, stated, "In response to your question on berm stability I am attaching a plan which shows the various phases and the GCL [geosynthetic clay liner] type you have installed. A review of the test results that you provided us indicates that the GCL used does not meet the design specifications. This is because different types of GCLs have been used instead of the GCL that should have met the specifications."

Sharma added that, as designed by Geosyntec, the berm had a factor of safety of about 1.5. WMH, however, chose to go with something cheaper, saving perhaps a few hundred thousand dollars, according to one expert. (The safety factor represents the actual structural strength divided by the minimum structural strength required.)

"As constructed (using the tested site material properties for Phase I, II, and III of the cap, please note that the materials delivered and used are of lower quality), the final cover underneath the berm has a factor of safety **significantly lower** than the generally accepted factor of safety of 1.5. In order to bring back to a factor of safety of at least 1.5, we suggest a fix by adding a toe berm. We still need to grade it but we have determined its dimensions; we will grade it once WM agrees with this fix," Sharma continued.

"Given these circumstances, the option proposed by GBI, of adding more soil on top of the existing west berm, is not recommended. It will make matters worse.

"Please review this information and let us know the decision. If all parties agree, we can plan to provide you with this toe berm grading plan next week. Again, please do not add more fill on top of the existing western berm," he wrote.

The email raised concerns with the DOH, especially since WMH's annual operating reports for 2008 and 2009 showed that part of the west berm was up to 32 feet higher than design grades. In other words, WMH added more fill in spite of warnings from the berm's designer.

According to Whelan, WMH added the fill because it didn't have enough room for material excavated during cell construction in 2007.

On May 13, the DOH issued a Notice and Finding of Violation/Order accusing the city and WMH of violating the terms of their previous permit by failing to construct the final cover and west berm in accordance with design specifications, failing to notify the DOH of non-compliance, and failing to submit interim status reports for the construction of each stage of the berm. The DOH ordered the permittees to build a toe buttress to the west berm within six months of the order. The department also ordered WMH and the city

to pay a \$424,000 fine for the violations within ten days of the order becoming final.

On May 25, attorneys William McCorrison, Lorraine Akiba, and Laura Lucas filed a request for a contested case hearing in behalf of Waste Management. Carrie Okinaga, counsel for the city, joined that request. Based on statements made by the parties in news reports, they don't deny the violations, but merely object to the level of the fine.

Public Purpose

Once the NFOV was issued, Waimanalo Gulch was operating without a permit **and** in violation of its previous permit. DOH rules, however, don't seem to address whether pending violations preclude permit renewal. In any case, on May 17, the DOH proceeded with a public hearing on a draft solid waste permit for the landfill. This was despite the fact that the DOH had found fault with the landfill's most recent design, submitted March 16. Specifically, the DOH found that existing wells at the toe of the ash monofill were "insufficient to evaluate potential releases from the proposed expansion," Chang wrote in a May 13 letter to Whelan.

In the end, the department felt the flaw could be addressed after the permit was approved by including a condition in the permit that required the submission of a new Groundwater and Leachate Monitoring Plan within 60 days of the permit's issuance.

At the May 17 hearing on the draft permit, the city's Steinberger presented the same arguments that swayed the LUC in its decision on the Special Use Permit: If the DOH did not approve the permit to allow for the expansion, the landfill would reach capacity shortly and be closed and H-Power would not be able to operate, since there would be nowhere to put the ash or residue.

The Ko Olina Resort & Marina, state Sen. Colleen Hanabusa, Concerned Elders of Wai'anae and others testified against the permit, citing concerns over litter, visual blight, leachate management, and the recent violations, among other things.

"What is truly laughable is that at page 51-56 [of the draft permit] are reports that are due. As recent as May 13, 2010, there is clear evidence that Waste Management and the city ignored the reporting requirements as showed by the DOH's fine of \$424,000," Hanabusa wrote.

The DOH responded to Hanabusa that it was unable to grant the requests to deny the permit application, adding, "Although we understand your frustration, we believe that as the only municipal solid waste landfill on

For Further Reading

Other articles published by *Environment Hawai'i* are available online: www.environment-hawaii.org

- ◆ "Resolution of Waimanalo Gulch Violation Case Pushes Limits of DOH Rules, Permit Deadlines" (July 2007);
- ◆ "City, Waste Management Struggle to Renew Waimanalo Gulch Permit" (February 2009);
- ◆ "Auto Scrap Lawsuit Draws Concern Over Metals in Waimanalo Gulch" (February 2009);
- ◆ "Hearing Begins on Honolulu's Petition to Change Landfill's District to Urban" (June 2009);
- ◆ "LUC Keeps Waimanalo Gulch Open for Municipal Waste Another 3 Years" (November 2009).

O'ahu, it does serve a purpose that benefits the entire island. We are encouraged by the City's efforts to construct a third boiler at H-Power and are optimistic that it will reduce the volume of waste being disposed in landfills. Nonetheless, the landfill is still required for the continued disposal of MSW residue and ash that will be generated from the H-Power operations."

On June 4, the DOH issued the city and WMH their permit, which will expire on June 3, 2015. Under permit conditions, the landfill can accept MSW and ash until the date specified in the LUC's SUP or until the landfill/monofill reaches capacity, whichever comes first. Arguments in the court challenge against the SUP began last month.

Whelan told *Environment Hawai'i* that a hearing with the DOH has been tentatively scheduled for November. He added that he could not answer questions about why WMH withheld information from the DOH or why it chose to use a different liner, since those issues pertained to the company's appeal. He did confirm that WMH would complete the ordered buttress berm in a month or so. Although he said the company "doesn't think the NOV was warranted," it was in the process of installing pipes for an expansion-related drainage project where the buttress berm is supposed to go when the NFOV came out. He said the company had already planned to place another berm over the pipes to increase stability in the area. — *Teresa Dawson*

Open Hostility Among Members Apparent in Recent Wespac Meeting

The Western Pacific Fishery Management Council, which recommends management measures for fisheries in the U.S. waters of the western and central Pacific Ocean, is finding that as resources diminish, managing what remains is getting harder and harder.

The discussions over several hot topics at the council's most recent meeting (June 28-July 1) often erupted in harsh exchanges. Most times, the sparring occurred between Peter Young, a council member from Hawai'i whose positions are often at odds with the council majority, and Manny Duenas, council member from Guam. Duenas has become a favorite of council executive director Kitty Simonds, who often sends him to meetings around the world to represent the council's interests. His frequent rants – against purse seiners, against the U.S. military, against environmentalists, against the National Marine Fisheries Service – have become a feature of council meetings.

Young, on the other hand, vainly attempted to rein in the council when its recommendations for fisheries management were viewed by him as exceeding what was prudent or supported by science. His lone partisan on the council was Laura Thielen, who has a seat at the table by virtue of her position as head of the Hawai'i Department of Land and Natural Resources.

In the end, over Young's strenuous objections, the council voted to recommend no change in the total allowable catch for bottomfish in the coming catch year (starting September 1); to ask the National Marine Fisheries Service to bless chartering arrangements in the territories that would allow them to assign part of their quotas for increasingly distressed bigeye tuna stocks to vessels based elsewhere in the United States; and to reiterate its strong objections to the inscription of the Papahānaumokuākea Marine National Monument on the list of UNESCO World Heritage sites.

Bottomfish

Sam Pooley, head of the Pacific Islands Fisheries Science Center, began his presentation on bottomfish with an abject apology. "On behalf of the Division of Aquatic Resources and the National Marine Fisheries

Service, I apologize to the council and to fishermen for basically mis-forecasting when the [bottomfish] fishery should be closed. We know this has an impact on the boats. Frankly, our staffs are pretty aghast. We made a mistake in data processing. We'd like to say it will never happen again, but forecasting a [Total Allowable Catch] is always difficult."

What Pooley was referring to was the closure of the 2009-2010 bottomfish season before fishers had reached the limit for the year. When the closure occurred (April 20), the actual catch stood at 208,412 pounds. With a TAC limit of 254,050 pounds, fishers were shorted roughly 46,000 pounds – about 18 percent.

*"Congress was trying to protect against a rogue council. I wasn't saying **this** was a rogue council."*

— Peter Young, WESPAC

Pooley outlined several factors that contributed to the early closure. "First, always, data reporting lags," he noted. "Fishermen are only required to report on a monthly basis, but we have to do projections [of future catches] on a weekly basis.... Two, there are potential issues with forecasting itself. Nobody ever knows, including individual fishermen, who's going fishing when.... We're trying to think ahead at least two weeks, sometimes a month, about what fishing will be like.... So there's inherent problems.... exacerbated by double-counting" about 10,000 pounds of the catch.

But, Pooley pointed out, there was "one slight bit of good news" resulting from under-shooting the target this year: total catch for the three years in which bottomfish TACs have been set now comes in a little bit under the target, offsetting the amount by which TACs were exceeded the first two years.

The council's Scientific and Statistical Committee recommended that the TAC for 2010-2011 be set at 244,000 pounds – a level that would carry with it a 29 percent risk of overfishing in 2011. On the other hand, the council's Plan Team pushed for a TAC of 269,000 pounds, with a 49 percent risk of overfishing. (Overfishing occurs when fish are removed at a rate that jeopardizes the fishery's long-term productivity.)

In the end, the council approved a motion that the TAC for bottomfish be set for 2010-2011 at the same level it was for the previous

year: 254,050 pounds, with a 33 percent risk of overfishing. But before getting to the vote, an at-times heated exchange developed, sparked by a comment from Young.

Young, arguing against the proposed TAC, raised the point that under the federal law governing fisheries management, the Magnuson-Stevens Act, councils are not allowed to approve of catch limits that exceed the recommendations of their Scientific and Statistical Committees, "so if we approve this, we'll be violating the law."

Fred Tucher, general counsel to the NMFS Pacific Islands Regional Office, replied that this requirement applied to Annual Catch Limits, or ACLs. "I want to point out that an ACL is not a TAC... They can be the same, but not necessarily so.... What you have here is not an ACL." The difference is subtle: An ACL, which must be set by the Scientific and Statistical Committee following a rigorous protocol, will be used starting in 2011 to

manage the fishery; councils may not exceed the ACL in setting catch limits. The SSC's recommendation on a TAC, on the other hand, is not developed in the same way.

The following day, Young made a motion to rescind the decision. The Magnuson-Stevens Act, he said, places "a precautionary obligation ... on fishery councils to protect the resources, so a rogue council does not exceed the level [recommended by] its science advisors.... I believe our obligations are clear and, at least to me, the intent of Congress is clear: Councils can't set fishing levels higher than the recommendations of our scientists. But that's what we did, and that's why I made the motion to rescind."

A raucous discussion followed, with Duenas declaring his resentment of Young's "characterization of this as a rogue council."

As several members called for the question, Young explained that he said "Congress was trying to protect against a rogue council. I wasn't saying **this** was a rogue council."

His efforts went down in flames. He and Thielen alone voted in favor of the motion. Eleven other council members opposed it.

Bigeye Tuna

As every island resident knows, from Thanksgiving to New Year's Day is peak season for ahi. Last year the longline fleet was

dangerously close to reaching its quota for bigeye tuna, source of the choicest ahi sashimi, in the productive seas of the western Pacific right in the middle of the peak holiday market. The quota was reached just a couple of days before New Year's Eve, and the much feared ahi closure had no effect. On January 1, a new quota year began, and the pressure was off – for the next 11 months, at any rate.

As of July 1, the Honolulu NMFS office estimated that 1,919 tons of bigeye had been caught against the annual quota of 3,763 metric tons set by the Western and Central Pacific Fisheries Commission (WCPFC). If bigeye were to continue to be caught at the same rate in the second half of the year, the quota would be reached once more just days short of the new year. At present, NMFS is estimating the fishery will be shut down around December 1.

But under federal rules for the bigeye

“Don't put your two cents in something you're unaware about.”

— **Manny Duenas, WESPAC**

fishery, it's unlikely the longline operators as a whole will face any meaningful limit on their catches for years to come. The rules, approved last December, allow the 11 vessels holding longline permits in both Hawai'i and American Samoa to land fish in Hawai'i that will not be counted against the Hawai'i quota, so long as the fish are caught outside the 200-mile exclusive economic zone around Hawai'i.

Last October, the council recommended that the territorial limits for bigeye tuna be set at 2,000 metric tons each. At its most recent meeting, in recognition that none of the territories has the capacity to catch this volume of fish, it recommended that NMFS develop “federal domestic chartering permits or similar mechanisms to provide appropriate oversight” of charter agreements between the territories and U.S.-flagged fleets. It also proposed a recommendation to NMFS that it set a limit of 750 metric tons on each territory's allocations of bigeye to charter vessels. This followed up on a council recommendation last year that charter vessels need to make only three landings a year in the territory – averaging 4 tons per landing – in order to qualify as being an “integral” part in the development of the territory's own fishery. Even then, the three landings would be required only when the island territory's infrastructure permitted.

Young objected. “I question how anyone says how 12 metric tons [three landings] of a total of 2,000 metric tons is an integral part of

the fishery. If anyone could explain it, that would be profound. . . . Are you suggesting that this is consistent with the commission's action, saying that these charter agreements and the vessels are an integral part of the domestic fleet?”

That opened the door for Duenas. “Knowing the three island fisheries, which you're not aware [of], Guam has had 30 years of transshipment [of landed fish]. . . . Guam has the infrastructure. Six flights a day to Japan, if not more,” he said. As for the Commonwealth of the Northern Mariana Islands, he said, “they have a two-prop plane. They can't even handle their medical people. . . . And don't expect a fresh longliner to unload in American Samoa unless there's a flight that week.”

“Don't put your two cents in something you're unaware about,” Duenas scolded Young. “You'd rather see purse seiners catch

bigeye as juveniles . . . and freeze it at forty cents a pound than a bigeye that would be put on plane and shipped to Hawai'i or someplace else at four dollars a pound.”

Both motions passed, over Young's objections.

Changes to the Fishing Year: To avoid the prospect of an ahi-free New Year's party, council staff looked closely at what effect changing the catch year might have. The same amount of tuna could be taken, but the start-end dates would not coincide with the

calendar year. The analysis turned up some surprising results.

If the longliners were to target bigeye in the Eastern Pacific as soon as they reached their quota of bigeye in the Western Pacific, they could realize a substantial increase in their revenue, of up to \$7 million a year (for a catch year starting September 1). On the other hand, if the catch year began in June, the net effect would be a loss of \$146,000.

The number of days that the fleet would be closed out of the Western Pacific varied widely as well. The current arrangement – with the calendar year coinciding with the catch year – accounted for the fewest closure days (45). If the Eastern Pacific was fished during that same time, the total net loss in revenues was estimated at \$1.725 million. The catch year that was most lucrative (the one beginning September 1) was also the one that had the most Western Pacific closure days: 99.

The council made no recommendation on any change to the fishing year. Instead, staff were instructed to seek out the advice of the fishing community.



Papahānaumokuākea UNESCO Designation

On the last day of the council meeting, executive director Simonds raised the topic of the proposed inscription by UNESCO of the Papahānaumokuākea Marine National Monument onto its list of World Heritage Sites at its meeting in Brazil, scheduled for July 25 through August 3.

Simonds reminded the council that as early as 2007, in commenting on the pro-



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posed designation, the council had “cautioned against this being designated a site... What happens when these sites are designated is full-on tourism. Exactly what we didn't want to see happen up there.”

Also, she said, the council objected in its comments on the failure to fully consult Hawaiian people about the proposal. “Why I brought this up,” she said, “is, I wanted to know if the council still maintains its objections to this designation.”

Thielen took exception to Simonds' characterizations. “As the representative of one of the monument management teams... I need to correct for the record some of the statements on this,” she said. “We have been

does very much limit tourism to specific areas, specific activities,” she said. If the council is concerned that safeguards against excessive tourism are weak, she added, “then the council should take the position that the monument managers should comply with the monument plan.”

Duenas then related an experience he had had while traveling for the council. “I had the opportunity to attend a special recognition for Mr. [Jean-Michel] Cousteau in Washington, D.C., where I actually cried. Because he said out in public, and he's the grandfather of this whole idea [for designation of the Northwestern Hawaiian Islands as a monument], that there will be three million tourists. You

would welcome a position by this council that says you support the management plan and the restrictions on any tourism activity and that you would encourage the monument managers to make sure if the heritage nomination goes through to keep those restrictions in place and not to undo those in the face of any pressure that may come forward.”

The council then considered a formal motion that it “reiterate its concern about the Northwestern Hawaiian Islands UNESCO designation process... that calls into question the transparency of the process to include public participation, the need to clearly provide the purpose and need or objective of the designation, and the role of the National Park Service administrative authorities and related jurisdictional issues.”

Thielen spoke against the motion, noting again the transparency of the management process and the involvement of OHA in developing it. The management plan “places strict limits on activities that can occur,” she said. “If we were to open it up to activities beyond the scope of the management plan, we'd be required under state law to do a new [environmental impact statement] before we could issue any new permits... I ask the council not to support this motion.”

Duenas repeated his concerns. “You didn't give consultation to the council,” he said, addressing Thielen. “Eight fishing boats [lost]. One of those fishermen happened to be a native Hawaiian. Only five active boats up there. If you look at amount of fish that's going to be consumed, and again I'm very disturbed—this monument was designated to be protected. No fish should be consumed by any inhabitant, scientist... Why is it [that] it's okay to play with fish, consume them if you're a scientist or resident... I don't care what OHA has to say, what the state of Hawai'i has to say... I don't care what kind of management plan you have.”

The motion passed. Thielen and Young were the sole votes opposed.

— *Patricia Tummons*

“What happens when these sites are designated is full-on tourism. Exactly what we didn't want to see happen up there.”

— *Kitty Simonds, WESPAC executive director*

working with a number of people. To say the Hawaiian people were not consulted is not correct. The Office of Hawaiian Affairs, the state representative of native Hawaiian interests, had set up early on in the process a kupuna group of advisory practitioners. And that group, after extensive discussion, totally supported the nomination. OHA worked with us step by step through the nomination process along with our federal partners...”

Simonds insisted that at meetings of the National Marine Sanctuary program — “not here, but in DC” — “there is a push to have tourism up there. Yes,” she told Thielen, that has occurred “since the monument was designated. When it happened, the whole idea was no-touch. Now you've developed a management plan...”

Thielen broke in: “The management plan

can ask the people there. I went to each one, and said, ‘you're taking out eight fishing boats and putting in three million tourists.’ I actually got drunk and cried... [O]ne of the participants in this whole exercise, a major player, was able to say this publicly, to share the wealth and experience of World War II, we're going to tie in Pearl Harbor to Midway with three million tourists a year.”

Thielen attempted to address Duenas' remarks. “Manny, you talk a lot about how the native people should have a say. Again, the kupuna group, the Office of Hawaiian Affairs, sat down and looked over this very closely. What they felt was that having designation as a cultural heritage site, not just a resource site, would provide an opportunity to showcase their history and culture in that area.”

The management plan includes a permitting process for monument access for any purpose. “It has to go through not just a federal process, but a state process as well... There's a tremendous amount of transparency, tremendous amount of involvement. I

