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Capitol Crimes

In this issue, *Environment Hawai'i* takes a close look at some of the freshly minted laws that have the potential to affect the state's environmental health for decades to come.

Among them are measures that: make shoreline development easier, even as coasts recede; extend exemptions to the state's EIS law; and clear the way for utilities to put the cost of renewable energy onto the bills of people who will never use it.

But the new law with potentially the furthest reach is Act 55. If we give it disproportionate attention in our wrap-up, that's because so little was paid to it as it snaked through the legislative process. Still, with a last-minute insertion of what seems to be disabling language, Act 55 is like a car without wheels: whether it can go anywhere is, at this point, a real question.

There were a few bright lights: the Department of Agriculture should be getting more money to carry out quarantine inspections, and the Department of Land and Natural Resources may now receive private donations to help with enforcement.

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THE LEGISLATURE, 2011

For Environment and Natural Resources, A 'Deeply Disappointing' Legislative Session

The 2011 session of the Hawai'i Legislature won't go down as a great one so far as the environment is concerned. Robert Harris, executive director of the Sierra Club, Hawai'i Chapter, has called it "deeply disappointing." Still, several of the bills that made it into law will probably have far-reaching consequences, for better or worse, for Hawai'i's natural resources and environmental health.

One of the shortest bills – less than a page long – is, from an environmental standpoint, also one of the best: Act 36 (House Bill 865). This raises the agricultural inspection fee on imported freight to 75 cents per one thousand pounds from the previous tariff of 50 cents, allowing beefed-up quarantine inspections for incoming freight, whether it arrives by air or sea.

One of the longest – at 44 pages – is among the most controversial: Act 55 (Senate Bill 1555). This sets up a new agency, called the Public Land Development Corporation, and gives it broad powers to develop state land and partner with, even finance, private enterprises. In addition, the corporation is exempt from compliance with the state land use law and county zoning and subdivision standards.

Bills to promote energy independence, to reset the requirements for a minor Special Management Area permit, to set up (again) a South Kona wilderness area, and to clear the way for cleanup of brownfields in Kapolei are also now the law of the land.

What follows is a more detailed analysis of several of the new laws. **to page 6**



Governor Neil Abercrombie signs Act 55 with Sen. Donovan Dela Cruz, Sen. Malama Solomon, Rep. Sharon Har, and Rep. Jerry Chang looking on.

PHOTO: GOVERNOR'S OFFICE / ED MORITA

Environment Hawai'i



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NEW AND NOTEWORTHY

Maui Mouflon? Investigations into how axis deer arrived on the Big Island have turned up one intriguing theory: that at least some of the deer were brought from Maui in exchange for mouflon from the Big Island.

Lending credibility to that suspicion are recent blog accounts and photos of mouflon hunts and a mouflon trophy taken on the slopes of Haleakala, at Arrow One Ranch. The ranch itself advertises “mouflon-hybrid” hunts on its web site, www.mauideerhunting.com, and says it has more than 1,000 axis deer and mouflon/hybrid sheep.



PHOTO: BEN KAWAKAMI JR./USGS

A herd of mouflon on the Big Island; is Maui next?

Keevin Minami, the Department of Agriculture’s land vertebrate specialist, told *Environment Hawai'i* that no one on Maui has applied for a permit to possess mouflon during his six-year tenure at the department.

Jeff Grundhauser, manager of Arrow One Ranch, told *Environment Hawai'i* in an email that his ranch does not have pure mouflon, but “we only have cross breed sheep, mostly Texas dall and Barbados.”

“Sometimes there are rams with similar colors like a mouflon,” he said, but he insisted there were no pure mouflon sheep. “The only place you can hunt a pure mouflon sheep now is on Lana'i and maybe there’s a couple of places on the Big Island.”

Devil Weed: The dreaded weed *Chromolaena odorata*, which the U.S. Army’s environmental crew recently discovered on O’ahu’s North Shore, may not pose a huge threat to Hawai'i’s wild habitats, according to University of Hawai'i forester J.B. Friday.

Although the weed — toxic to humans, livestock, and other plants — is considered one of the worst in the world, it struggles in the shade.

“Personally, I don’t see *Chromolaena* becoming a major problem in natural areas, but it could be a real problem for ranches,” Friday stated in an email he recently posted on an invasive species list serve.

The weed, which forms dense, monotypic stands, has overwhelmed grazing lands in dry and mesic areas in East Timor, he added, but seemed outcompeted by grass in wet areas.

It’s also present in the Philippines “but I never heard it referred to as a problem. Farmers find it easy to clear for cultivation,” he wrote.

The Army, the O’ahu Invasive Species Committee, the state Department of Agriculture,

and the Bishop Museum’s O’ahu Early Detection program are mapping the weed’s locations and developing a management strategy.

Although the plant can produce annually 800,000 seeds that can last up to a year in the soil, effective control methods, including several biocontrol agents, exist.

Military training most likely introduced the weed to Hawai'i, according to an article by the Army’s Jane Beachy in the May/June 2011 issue of *Public Works Digest*. It adds that the O’ahu Army Natural Resources Program will invest a significant amount of time and money to control the weed.

Chromolaena is found throughout Asia, Australia, Africa and Oceania. So far, surveyors have spotted the weed on at least 150 acres on O’ahu.



PHOTO: J.B. FRIDAY

A gall (shown here) on devil weed: a possible biocontrol measure?

Eureka! A few months ago, a state contractor determined through genetic testing that the Myoporum thrip, a pest that poses a threat to native naio, is originally from Tasmania. That’s according to Cynthia King, an entomologist with the state Department of Land and Natural Resources’ Division of Forestry and Wildlife.

Now that managers here know the insect’s home range, they can search for its natural enemies and test whether any of them can be used as biocontrol agents.

The thrips were found to be attacking naio (*Myoporum sandwicense*) at Waikoloa in March 2009, and the infestation has since spread to other areas in the northwestern part of the Big Island.

“What we’re seeing in the field, it’s pretty bad,” King told the Natural Area Reserves System Commission in June. She added that a grant application has been filed to fund biocontrol research.

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Quote of the Month

“[P]ublic processes can really derail good science and lead to poor decisions.”

— Rob Pacheco, *Land Board*

BOARD TALK

Banned Expert in Coral Disease Returns to Northwestern Isles



Greta Aeby

As the group of scientists filed out of the room, Bob Nishimoto, a state aquatic biologist, clamped his arm around Greta Aeby's shoulder and gave it a pat. After five years of exile, Aeby was finally going to resume her coral disease research in the Northwestern Hawaiian islands (NWHI), despite opposition from two environmental groups.

On June 8, the state Board of Land and Natural Resources approved a recommendation from its Division of Aquatic Resources (DAR) to grant Aeby a permit to conduct research and experimental management in state waters within the Papahānaumokuākea Marine National Monument.

The permit, which runs from July 15 to September 30, allows Aeby to assess the incidence of disease on corals at several sites throughout the NWHI, determine whether tumors afflicting *Acropora cytherea* affect the coral's growth, and test whether removing those tumors will help it grow and reproduce. She will also study diseases in surgeon and butterfly fish.

Locked Out

Aeby, an assistant researcher with the University of Hawai'i's Hawai'i Institute of Marine Biology (HIMB), had been effectively banned from working in the NWHI since July 2007, when the Land Board found she had violated her 2006 permit.

The violation occurred when the research vessel she was on unexpectedly left French Frigate Shoals for Gardner Pinnacles with two live coral fragments she had collected still on board. Her permit prohibited the transport of live organisms taken within the state's NWHI marine refuge to areas outside it.

Under the penalty section of DAR's refuge rules, an applicant can't apply for a permit within one year of a violation. Another section states that the board shall deny applications based on past violations.

In early 2007, DAR recommended suspending Aeby from working in the NWHI for one year and imposing a fine. In July of that year, the board fined her \$1,000, but deferred her request to join the research cruise, in part, because deputy attorney general Linda Chow had advised that the

board's rules precluded it from granting a permit to anyone who had violated a previous one. The cruise left before the board could decide on her permit.

A June 2008 proposal that would have allowed UH researcher Evelyn Cox to continue Aeby's work failed. Cox had requested that Aeby be allowed to join her in the NWHI. Although it was DAR's position at the time that refuge rules permanently banned Aeby from the NWHI, some Land Board members, including Rob Pacheco and Sam Gon, weren't so sure. At the board's June 13, 2008 meeting, however, while discussing Cox's permit request, then-Land Board chair Laura Thielen quashed attempts by Aeby's attorney and husband to weigh in on the lifetime ban issue.

The board eventually granted Cox a permit, but not her request to have Aeby tag along. According to last month's DAR report to the board, Cox never carried out the activities listed in her permit.

In April 2010, Aeby sought a Land Board permit to conduct coral and fish disease research in the NWHI, but DAR recommended denial, citing its rules requiring the board to "deny an application based on a past violation or non-compliance with any term or condition of a permit." However, DAR also stated that it wanted clarification on the rules "as they pertain to permitting."

The Papahānaumokuākea Marine National Monument Management Board (MMB) supported Aeby's application on the conditions that she not SCUBA dive or handle or process samples and that a monument employee be onboard to oversee her permit activities.

The board deferred her request, which she later withdrew because of DAR's recommendation.

A Change of Heart

When Aeby re-applied for a permit to resume and expand her work in the NWHI this year, the MMB appeared supportive, concluding that understanding coral disease is vital to the management of the NWHI. But due to her violation, members could not agree that granting a permit was entirely appropriate.

"The MMB continues to explore unresolved federal policy and legal issues, related to the previous state violation by this appli-

cant, that may preclude issuance of this permit," DAR's June 8 report to the board states. Even so, the MMB supported DAR's proposed permit conditions.

Absent from DAR's report is any mention of its previous determination that refuge rules banned violators from the NWHI for life, but its recommendation to approve the most recent application suggested its legal advice had changed.

At the Land Board's June 8 meeting, KAHEA: the Hawaiian-Environmental Alliance and the 'Ulu Foundation submitted written testimony against DAR's recommendation.

Both groups argued that the Land Board could not legally issue a permit to an applicant that has violated refuge regulations. They also expressed concern about the number of samples Aeby proposed to take and the possibility that her work could actually spread disease.

"Even if the board could issue [a permit], doing so would not be in the best interests of the resource because the applicant is requesting to take 2,600 samples of coral without knowledge of its consequences for the resource," KAHEA's written testimony states.

"Do not allow this one-strike rule to be watered down," KAHEA program director Marti Townsend told the board. Because NWHI research permits are only issued once a year, a one-year suspension is equivalent to none at all, she argued.

In defending her proposal, Aeby noted that *Acropora* tumors aren't found — and therefore, can't be studied — in the Main Hawaiian Islands and that the tumors should "pop right off." As far as the 2,000-plus samples mentioned in her permit application, Aeby said she would only take coral samples if she found new diseases.

After an executive session, Land Board chair William Aila said that deputy attorney general Pamela Matsukawa had advised the board that state regulations allow it to issue Aeby a permit. Matsukawa told *Environment Hawai'i* that the rationale behind the change in position was privileged information.

Lessons Learned

When Pacheco asked what lessons she had learned from the whole experience, Aeby maintained that she had not violated her permit. The violation occurred when the cruise itinerary changed without her knowledge, she said.

If anything, the case was a lesson in communication and human nature, Aeby said, adding that had she known the boat was leaving FFS early, she would have asked the

lead scientist onboard what to do with the coral fragments.

"I just wanted to know, can we keep healthy [Acropora] coral onboard," she said. "It wasn't an important part of my research. It was just really follow-up for future stuff. I would have been happy to sacrifice it. ... I will take responsibility for not keeping the door of communication open and being a little more aware of politics and social ..."

"A little more aware?" Pacheco interjected.

"A lot more aware," she said. She then assured him that she would adhere to every permit condition this time.

"I've certainly learned my lesson," she said. She also noted that she is one of only a handful of coral disease experts in the Indo-Pacific.

Before voting, Pacheco said that with just one board member being a trained scientist (Sam Gon) the Land Board needs to be careful vetting scientific information. He said the board has its own staff and federal partners to do much of that.

Pacheco then likened Aeby's case to that discussed in a recent study of Big Island activist Sydney Singer's campaign against efforts to control strawberry guava and other invasive species. (For more on the study, see last month's issue of *Environment Hawai'i*.)

"It's a case study of situations like this where citizens intervene. [It's about] public perceptions of science and making management decisions. It's a very enlightening study ... on how these kinds of public processes can really derail good science and lead to poor decisions," he said.

In the end, the board voted 4-1 to approve the permit, with Kaua'i member Ron Agor being the sole dissenter.



KAHEA Contests Exemption from Environmental Review

Also on June 8, the Land Board granted permits to researchers hoping to study ocean carbon and nutrient productivity in the NWHI. It also gave a permit to HIMB's academic program specialist, who planned to document field work in the monument for education and outreach purposes.

As with all of the Land Board's NWHI permits approved over the past couple of years, the board declared that the permitted activities were exempt from state environmental assessment requirements.

"The exemption class for scientific research with no serious or major environmental disturbance appears to apply," DAR's report to the Land Board states. It adds that

the activities appear to fall squarely under an exemption in the 1976 list for the Division of Fish and Game (DAR's predecessor agency). That exemption covers "surveys, censuses, inventories, studies, photographing, recording, sampling, collection, culture and captive propagation of aquatic biota."

These permits, in particular, involved photography, filming, and the collection of water samples, reef algae, and small bivalves.

Despite DAR's opinion that the activities would have no significant immediate or cumulative impacts, KAHEA's Marti Townsend renewed her longstanding argument that the cumulative impact of research in the monument needs to be evaluated in an environmental assessment (EA) or environmental impact statement (EIS). Neither the EA done for the monument's management plan nor a 2009 scientific paper on the cumulative impacts of human activities in the monument, including research, satisfied legal requirements, she told the board.

"The basis for making a determination on whether something has cumulative impacts is an EIS. The EA that was done for the monument management plan does not include research," she said.

Townsend added that DAR does not have its own exemption list and that even if it did, it could not allow an exemption because the actions are proposed for a highly protected, particularly sensitive environment.

"I don't want to discourage important research, but I do also want to implement and uphold the precautionary principle as high as possible. An environmental assessment should be part of the research process," she said.

She recommended that the board defer acting on the items until an EA is completed.

With regard to research activities in the NWHI, the EA for activities in the Papahānaumokuākea Marine National Monument did cover things like mapping and monitoring deep-water habitats; measuring connectivity and genetic diversity; developing a Natural Resource Science Plan (NRSP); implementing management-driven research priorities identified in the NRSP (approved on April 11); and including an educational component in marine research expeditions.

The EA also states that some activities won't have any environmental impacts, either individually or cumulatively, "and are therefore categorically excluded from further analysis under a categorical exclusion by one or more of the co-trustee agencies."

Although the EA states that the development and implementation of the NRSP might be addressed in future environmental assess-

ment documents, attorneys with the National Oceanic and Atmospheric Administration have determined that an EA is not required since the plan doesn't commit agencies to a course of action or fund or permit research, according to the NWHI Reserve Advisory Council's June 2009 meeting minutes. Townsend, however, has stated that she believes an EA must be done for the science plan.

Been There, Done That

To HIMB scientist Rob Toonen, an even better cumulative impact assessment than the one Townsend wants was done years ago. He told the Land Board that research he co-authored on human impacts in the NWHI has undergone international peer review and was published in 2009 in the *Journal of Coral Reefs*.

"It has been held to a much higher standard than the actual [environmental assessment] that Marti has been talking about. It found there was no significant cumulative impact of the research being done or proposed within the monument," he told the board.

"We voluntarily undertook a study to look at potential impacts and likely cumulative impacts that would take place in monument boundaries. ... What we found is all the top threats are things that are essentially global—ocean acidification, climate change, marine debris, not the impact of research vessels," he told *Environment Hawai'i*, adding that the most popular site has been visited by 160 people since the monument was designated in June 2006.

In April 2010, DAR cited Toonen's article, as well as its own statistics on research impacts, when it presented its case to the Land Board on why NWHI permits qualify for an exemption.

Although Townsend had asked that DAR's data, as well as Toonen's article, be included as part of an EA, attorney Douglas Codiga (representing the University of Hawai'i) argued that the information satisfied the state environmental review law's exemption requirements. The Land Board has agreed and DAR has been successfully applying the 1976 Fish and Game research exemption for more than a year.

In May 2010, DAR did submit a proposed exemption list for state Environmental Council approval that included a specific exemption for Papahānaumokuākea permits, among other things. Even so, Toonen said he believes government agencies and permittees are meeting all legal requirements.

"The lawyers have all weighed in on it, the categorical exemption. The attorneys, federally and locally, say the letter of the law has

been met. Marti doesn't want to accept that. What everyone is worried about, what Marti is pushing for, is to have an EIS for every permit that comes up. That's dozens, at least, a year, if not hundreds a year," he said. "The state and federal governments can't afford to do that."



Native Hawaiian Contests Purchase Of Kawa Bay by County of Hawai'i

Hawai'i County's acquisition of land at Kawa Bay could involve the eviction of a 68-year-old native Hawaiian man who has been living in the area for 23 years, albeit illegally in the eyes of the court.

There is little mention of this in a Division of Forestry and Wildlife report to the state Board of Land and Natural Resources, whose blessing was needed for the purchase to move forward. But on the Big Island and to members of the state's Legacy Land Conservation Commission, the battles of Abel Lui to stay on the property are well known.

Since 1991, Lui, a Hawaiian sovereignty advocate, has been arrested and convicted of trespassing on land in Kawa multiple times. He's fought for title and lost and recently lost ejection lawsuits from the county and from the land's recognized owner, the Edmund C. Olson Trust, in 3rd District Court.

On May 27, shortly before the District Court decisions, he pleaded with the Land Board to deny the county's acquisition of the land.

"Show me your aloha," he said.

Although the board approved DOFAW's recommendation to enter into an agreement with the county to provide \$1 million in U.S. Fish and Wildlife Service funds for the land's purchase, board members also recommended informally that chair William Aila work with the county on conditions that might allow Lui to stay on, perhaps as a caretaker.

Lui has requested a contested case hearing.

Immovable Abel

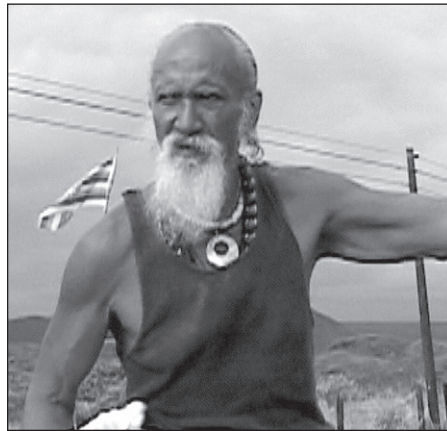
For the last several years, the county of Hawai'i has been buying coastal lands in Ka'u — rich in natural and cultural resources — to protect them from development. The Olson Trust's 550 acres at Kawa include heiau, endangered seabirds and sea turtles, and native coastal strand vegetation. From the start, the presence of Lui and the dozen or so family members who live with him in Kawa has been a concern of both state and county agencies.

Lui grows taro, sweet potato, banana, and watermelon throughout the area and is regarded by many as a caretaker. He holds surf

contests and Easter egg hunts, has kept tabs on the effects pesticide spraying in the area may be having on native birds and has befriended a monk seal (he calls her "girly") that frequents the area. He has also fiercely defended his right to stay on the lands, which he says belong to his family.

"[Former] Mayor [Harry] Kim came to visit me five times. I told him I am here for the duration," he told the Land Board.

Last year, the county acquired 234 acres at Kawa from Marcia Johnson for about \$2 million, most of which came from the Legacy Land program. Lui's house sits on this parcel, but he claims title to lands owned by the Olson Trust as well.



"Show me your aloha."

— *Abel Lui*

When the county's Public Access, Open Space and Natural Resources Preservation Commission discussed plans in late 2007 to buy the Olson lands and what to do about Lui, then-county property manager Harry Yada said that it would address Lui's presence on the property after completing the sale.

Commissioner Kim Garcia suggested that traditional caretakers could establish a non-profit organization "to possibly manage the property."

During subsequent meetings of the Legacy Land Conservation Commission, commissioners struggled to address Lui's concerns about possible infringement of his native and property rights. The commission ultimately recommended Land Board approval of the project.

Then in March of this year, the county filed a motion in 3rd District Court to remove Lui from the property. The Olson Trust, which contends that Lui and his family are simply squatters and have no proof of ownership, filed a similar motion. Lui lost both cases. A hearing on a lawsuit the Olson Trust filed in U.S. District Court to settle title issues was ongoing as of press time.

'A First Step'

At the Land Board's May 27 meeting, Keola Lindsey of the Office of Hawaiian Affairs supported DOFAW's recommendation to enter into the agreement and help the county buy the land.

"We see it as a first step in a long process to get to a positive result," he told the board. Title issues would be worked out elsewhere, he said.

"The action gives the Land Board chair the ability to impose terms and conditions that best serve the interests of the state and the community," he said, while asking that future actions regarding the land be coordinated with community members and families on the land. He also wanted those actions to comply with state environmental laws.

At-large Land Board member Sam Gon agreed with Lindsey's recommendation to work with community members who traditionally use the property. Gon asked DOFAW administrator Paul Conry whether there was any plan for or increased likelihood of evictions after the purchase.

Conry answered that he wasn't urging anyone to do that, but noted that the county, not the state, will hold title to the property. The agreement does require the county to work with the community on managing the lands, he said.

Board members Jerry Edlao and David Goode, eager for more specific, definite answers, asked Conry why no one from the county attended the meeting.

Goode said that \$4.5 million — the county's share in the \$7.68 million purchase — is a significant amount of money for any county, especially a neighbor island.

"I'm very surprised that no one for the county showed up. It kind of tells me how interested they really are. You can't spend that kind of money, in my opinion, and not show up and tell us what are you planning on doing with the land, how they plan to work with lineal descendants and... community groups. They mentioned one [Ka 'Ohana o Honu'apo] but I don't know what any of the other ones are. I'm kind of at a loss for words," he said.

Kaua'i Land Board member Ron Agor proposed inserting a provision in the agreement that would direct the county to enter into some kind of stewardship program to allow Lui's family to help care for the land and allow it to remain there.

"I don't hear that there's a whole bunch of other families there. I'm throwing it out there," he said.

Goode supported the idea, noting that the land ownership issue will likely be adjudicated by the courts.

"[Regarding] folks that are on lands where there may be questionable ownership, this is the first case I've seen that's like, this guy knows this piece of land. This individual ... knows the land, the flora, the fauna, the spirits. What I saw was very good. Hopefully ... there is a place for you and your family and what you do to continue in the right way," he told Lui.

O'ahu board member John Morgan was a bit more cautious about Agor's proposal.

"I kind of agree," he said. He pointed out that the board had only known for an hour and a half about Lui's story. Because the county has been involved for much longer than that, Morgan said, the board should "have some kind of deference to their wisdom, too. I'm kind of uncomfortable being the puppet master here. I would support accepting staff's recommendation without additional strings [and let the chair work out conditions]." He added, "I will go on record to say I'm very surprised that the county is not here."

Ultimately, the Land Board decided to let chair Aila negotiate conditions regarding Lui. It did, however, add a condition to the agreement requiring the county to brief the board on any management plans for the property before final approval.

"If the county asks what happened, tell them, if they showed up, they would know," Edlao told DOFAW staff.

After the board's decision, Lui requested a contested case hearing. As of press time, DOFAW staff was still awaiting guidance from the Attorney General's office on how to proceed.

The \$1 million Recovery Land Acquisition grant from the U.S. Fish and Wildlife Service and the state's \$1.2 million Legacy Land grant were set to expire on June 30, but have been extended for another year.

According to county property manager Ken Van Bergen, as of mid-June, no one from the DLNR had discussed conditions regarding Lui with him. In fact, he did not seem aware of the suggestion by some board members that Lui be allowed to stay.

Aila says the board's intent was to determine if the county could devise an agreement so Lui can continue to care for the property, but he has not recommended any specific conditions since his department is still evaluating its legal options.



Coal Carrier Nearly Escapes Board Scrutiny of Grounding

Over the last several years, the Land Board has aggressively pursued millions of dol-

lars in fines against vessel owners and polluters for damaging coral in state waters. So board members were shocked in May when staff with the DLNR's Division of Aquatic Resources (DAR) revealed that it had no plans to pursue a violation case against the *Voge Trader*, a 734-foot bulk carrier that ran aground off O'ahu more than a year ago, damaging a 3,500-square-meter area.

The Liberian-flagged vessel hit the reef in the Kalaeloa-Barbers Point harbor entrance channel on February 5, 2010, and DAR was expected to assess the extent of the damage. But according to DAR's Francis Oishi, key staff involved in the case (including former administrator Dan Polhemus) left the division before a recommendation on fines could be brought to the board.

Since the incident, the National Marine Fisheries Service has taken the lead, working to mitigate the resource damage — at the cost of the vessel owner — under the authority of the federal Oil Pollution Act.

On May 27, Oishi requested Land Board approval of special activity permits to Matthew Perry of the NMFS and Randy Cates of Cates International, Inc. to restore live coral and clear loose dead coral in the channel.

When asked by Maui Land Board member Jerry Edlao why DAR has not pursued a fine, Oishi said it was because the agency lacked the manpower.

"You're kidding," Edlao said.

"No, I'm not," Oishi responded, adding in an exasperated tone, "Where is our administrator?" He was referring to the fact that DAR has been without one since Polhemus left in March 2010.

When pressed, however, Oishi said DAR could still look into pursuing a violation case.

O'ahu board member John Morgan said that while he has always been uncomfortable with the methods the DLNR has used to determine the value of damaged coral, he was also uncomfortable that the department was not being consistent in its enforcement.

The same issue also plagued at-large member David Goode, who noted that the Land Board had recently decided on a very difficult case involving a much smaller area.

Last year, the Land Board fined American Marine Corporation \$132,000 for damages to 312 square meters of coral near Maui's Keawakapu artificial reef. DAR had proposed a fine of \$400,000.

"To let these guys sail away ... doesn't sit well with me. You guys gotta make the time," Edlao told Oishi.

In the end, Oishi promised to update the Land Board in one month on DAR's efforts to resolve the case, but he had not done so by the end of July. — *Teresa Dawson*

Legislature from page 1



Act 55: The Public Land Development Corporation

If one reads no further than the "findings Land purpose" section of Senate Bill 1555, introduced by Donovan Dela Cruz, it seems innocuous enough. "Public lands in certain areas may serve the State and its people better if managed and developed into suitable recreational and leisure centers where the public can congregate and where visitors to our State can go as part of their holiday experience," it reads.

"However, the department of land and natural resources is hamstrung by its limited mission," the preamble continues. The establishment of the Public Land Development Corporation "may help to create these recreation and leisure areas, while also creating revenue-generating opportunities for the new corporation." The revenues generated "may be used to offset the regulatory functions" of the DLNR, the bill goes on to say.

The DLNR response was chilly: "as drafted," said administrator William Aila in his written testimony, "the bill will likely only serve to create an additional organizational layer, and ... the transfer of all of the public lands suitable for development from the Department to the new corporation will hamper the Department's attempts to expand its revenue generation because any revenue generated from those lands would first go to the new corporation and only the excess, if any, would be transferred to the Department to cover operational expenses and programs."

Initially, the bill also proposed allowing commercial vessels to use Ke'ehi Lagoon and Ala Wai small boat harbors. Members of the boating community and owners of condos at the Ilikai protested, and by the time the bill made it out of both chambers, the provisions offending to these groups had been largely removed. However, subject to the approval of the DLNR, the corporation may still "assume management responsibilities for small boat harbors ... for periods not to exceed one year." Also, the legislation provides for the corporation taking over development projects at all small boat harbors by June 30, 2013, at the latest.

Apart from the boaters and condo owners, the bill attracted little public attention as it moved through the Legislature. The only testimony of agency heads came from Aila and Kalbert Young, director of the Department of Budget and Finance. Young was

critical of the bill from a technical viewpoint. He observed that any revolving fund (such as that to be set up by this bill) should show “a clear nexus between the benefits sought and charges made upon the users,” provide “an appropriate means of financing for the program or activity,” and “demonstrate the capacity to be financially self-sustaining.”

“In regards to Senate Bill No. 1555,” he commented, “it is difficult to determine whether the fund will be self-sustaining.”

Young also observed that the language of the bill anticipates that the corporation could be operated as a for-profit entity, and in that case, it would probably not be able to issue tax-exempt revenue bonds. “Taxable revenue bonds, with interest rates higher than those of tax-exempt revenue bonds, may need to be issued to finance the project.”

The bill passed through conference committee and sailed through to passage in both houses. Ten representatives (Karen Awana, Dela Au Belatti, Tom Brower, Fay Hanohano, Jo Jordan, Chris Lee, Sylvia Luke, Scott Saiki, and Jessica Wooley) voted against the bill, as did one senator (Les Ihara). Governor Abercrombie signed it into law on May 20, despite an eleventh-hour effort by Hawai'i's Thousand Friends and some members of the Environmental Caucus of the Democratic Party to derail the measure.

From Shadow to Spotlight

Only in June, after Richard Lim, director of the Department of Business, Economic Development, and Tourism, spoke to the Hawai'i Economic Association, did Act 55 begin to receive greater scrutiny. Dan Nakaso, a reporter for the *Honolulu Star-Advertiser*, covered the event, quoting several inflammatory statements from Lim in the article he wrote, published on June 3.

Lim called for improving parks and other state lands that have been taken over by “undesirable elements,” Nakaso reported. Lim went on to pin “vicious maintenance costs” that “drain[ed] our economy” on vandalism.

Although in his prepared remarks he insisted that he was “all for protecting the environment,” he mocked the groups that defeated the Hawai'i Superferry: “Ten surfers and a couple of well-heeled NIMBYs can wipe out economic development in the state,” Nakaso quoted Lim as saying.

Lim described the state as having “vast land resources which currently represent a drain on the state's coffers due to heavy maintenance costs.... By engaging in public-private partnerships, we hope to turn this situation around.”

On June 22, Ian Lind, apparently spurred

by an email from Donna Wong, director of Hawai'i's Thousand Friends, connected the dots between Lim's comments to the HEA and Act 55. “State moves towards privatization and development of public lands without regard to zoning or land use laws,” read the headline on Lind's blog that day. Act 55, he wrote, “will create a potentially very powerful Public Land Development Corporation to implement Lim's strategy for privatizing public resources.”

“The new PLDC is charged with selecting land from the state inventory and promoting private development for projects,” which may include office space; parking; commercial uses, hotel, residential and timeshare units; fueling facilities; storage and repair facilities, and seawater air conditioning plants, Lind noted. He went on to quote Wong, who had “warned in an email that ‘all public land will be for sale.’”

(Lim did not submit testimony at any of the hearings on the bill. However, after the measure became law, he is now “pushing everything” so far as setting up the corporate board goes, according to a source at the DLNR.)

Yes – and No – and Maybe

Whether Act 55 does, in fact, allow the PLDC to pluck the plums from the state's land inventory and dump them into the laps of developers is not clear. One paragraph tucked into the law would seem to put beyond the corporation's reach any lands in the DLNR's current inventory.

Specifically, the language of Section 4(b) reads:

Notwithstanding subsection (a) to the contrary [subsection (a) lists 21 powers of the new corporation], the corporation shall not acquire, contract to acquire by grant or purchase, own, hold, sell, assign, exchange, transfer, convey, lease, or otherwise dispose of, or encumber any real, personal, or mixed property that is owned by the department as of July 1, 2011, except as expressly provided in this chapter.

What the new law expressly provides addresses development proposals at the small boat harbors managed by the DLNR's Division of Boating and Ocean Recreation.

On its face, the law would thus seem to deny the corporation any use of land now held by the DLNR. If that is the case, it would seem to stall out the PLDC before it gets started.

However, in an interview, Dela Cruz stated that it is wrong to read Section 4(b) as though it were telling the corporation to keep its mitts off public land now in the DLNR's inventory.

Instead, he insisted repeatedly, Section 4(b) means only that any requests for proposals that the DLNR has outstanding as of July 1 shall not be taken over by the PLDC, with the “express provisions” referring to the PLDC taking over all developments at small boat harbors within two years. To Dela Cruz, the language had no ambiguity; he defended it as having been drafted by attorneys on the Senate staff and in the Legislative Reference Bureau.

The apparent hands-off language was not a part of the bill as it moved through committees in the House and Senate. It was rather inserted at the last minute by the conference committee, chaired by Dela Cruz and David Ige for the Senate, Jerry Chang and Sharon Har for the House. (Other conference committee members were Senators Brickwood Galuteria, Ron Kouchi, Malama Solomon, and Sam Slom; and Representatives James Tokioka and Gil Riviere.)

Whatever the meaning of this paragraph, language further on in the law seems to open the DLNR's land pantry to PLDC raids: “Notwithstanding Chapter 171 [dealing with public lands] or any provision of this chapter to the contrary, the department may transfer, subject to the approval of the board of land and natural resources, development rights for lands under its jurisdiction to the corporation...” One source at the DLNR suggested that by giving the corporation development rights to state land instead of title to it, the corporation could get around the earlier restriction on use of lands in the current inventory. But if the development requires bonding (as the new law anticipates), and the bonding entails placing a lien on the real property being developed, it would run up against the many prohibited actions listed in 4(b).

Act 55 also seems to undercut Chapter 171 in another way, through the direct lease of state lands. Anyone now wanting to use state lands is required to obtain the lease through a public auction, but the PLDC can apparently lease the lands directly to an entrepreneur whose development plans are included in the PLDC's Public Lands Optimization Plan. Dela Cruz emphasized that if the Land Board does not agree to a proposal of the PLDC, it doesn't have to approve it. And should members of the public have concerns or objections to a given project, they can make their views known at the publicly noticed board meeting where the subject is to be taken up, he said.

Broad Exemptions

The very way in which the corporation acquires lands for its projects is left ambiguous. One part provides for the corporation acquir-

ing land “by grant or purchase.” Another part says the corporation may “recommend to the board of land and natural resources the purchase of any privately owned properties that may be appropriate for development.” In the interview, however, it was clear that Dela Cruz anticipates that most, if not all, of the lands the corporation will be developing will be drawn from the DLNR’s present inventory.

The new law gives the corporation a free pass to ignore a wide range of other laws: “projects pursuant to this chapter shall be exempt from all statutes, ordinances, charter provisions, and rules of any government agency relating to special improvement district assessments or requirements; land use, zoning, and construction standards for subdivisions, development and improvement of land; and the construction, improvement, and sale of houses thereon.” The PLDC is required only to “coordinate” with county planning departments and land use plans, not help to them.

Dela Cruz said that it would be up to the Land Board to ensure that any development the corporation was proposing would be consistent with Chapter 205, the state’s land use law. “There’s already a process” for complying with Chapter 205, he said. “The Land Board is the board that has to transfer over development rights of property to the corporation. So there’s going to be ample dialogue. The Land Board will have to take it up, follow the Sunshine Law before it transfers it over.”

The law does not exempt the corporation from compliance with Chapter 343, the state’s environmental policy act, Dela Cruz noted. He was asked at what point Chapter 343 would be triggered – whether it would be before the corporation received development rights to public lands or afterward. In responding, he laughed at the very question. The transfer would be based on a plan, and plans don’t require any Chapter 343 review, he said. So it would be left to the corporation to prepare and accept an environmental assessment or environmental impact statement for any given project.

More than Just Land

While most public attention has been focused on the PLDC’s potential use of public land, Act 55 does far more than encourage public-private partnerships on state parks or urban lands. It allows the corporation to acquire stakes in start-up enterprises, and not just ones that will be using public land or which promote tourism or recreation. The definition of “enterprise” in the act is wide-ranging: “a business with its principal place of business in Hawai’i, which is or proposes to

be engaged in recreational and commercial area development, development of new value-added products, enhancement of existing recreational or commercial commodities, and the application of existing recreation or commercial areas and appurtenant facilities to productive uses.”

Dela Cruz insisted, however, that “there has to be a land nexus” for any project in which the PLDC is involved.

Although the act limits the corporation to holding no more than a 49 percent or \$500,000 stake in any one such enterprise, that restriction can be lifted if the enterprise is in trouble: “if a severe financial difficulty of the enterprise occurs, threatening the investment of the corporation in the enterprise, a greater percentage of those securities may be owned by the corporation.” The dollar limit may be lifted “if the corporation finds ... that additional investments ... are required to protect the initial investment.” As much as 50 percent of the corporation’s assets can be invested in this way.

The corporation can also develop “project facilities” – infrastructure, that is – that can be financed through bonds and by levying assessments against owners of other properties not directly in the project but which may benefit from the improvements. The bonds are not to be issued in the name of the state, but rather only in the name of the corporation – something that may make interest rates on the bonds higher than otherwise. (That is over and above the concerns, included in Finance Director Young’s testimony, that the bonds may be more expensive than otherwise if they are not tax-exempt.)

The PLDC is also allowed to undertake activities that seem to step on the toes of the Hawai’i Tourism Authority. It can award grants for “new recreation and visitor-industry related products.” In developing its “public land optimization plan” – or PLOP – it is required to develop “feasible strategies for the promotion and marketing of any projects, including ... timeshare [and] hotel ... projects, in local, national, and international markets.”

Another state agency whose kuleana is usurped, at least in part, by the PLDC is the Hawai’i Strategic Development Corporation. The PLDC is authorized to invest its revolving fund in enterprises needing “seed capital,” if (among other things), “there is a reasonable possibility that the corporation will recoup at least a part of its investment.”

The Board

The PLDC board has five members: the head of the DLNR (Aila), the head of the Department of Budget and Finance (Young), and the head of DBEDT (Lim) are ex officio, while the speaker of the House of Representatives and

the president of the Senate are to appoint one each, “provided that the persons appointed ... shall possess sufficient knowledge, experience, and proven expertise in small and large businesses within the development or recreation industries, banking, real estate, finance, promotion, marketing, or management.” As Lind observed: “Conservation? Environment? Public interests? No seat at the table.”

Although Act 55 stresses that the PLDC is to administer an “appropriate and culturally sensitive public land development program,” there is no provision for anyone with expertise in Hawaiian issues to advise the board.

The corporation was placed under the aegis of the DLNR “for administrative purposes.” As of press time, no date had been set for the first meeting. The act authorizes \$165,000 for an executive director but provides no funds for planning.

Dela Cruz said that he had not talked with anyone about the legislation before he introduced it, except for Malama Solomon, the vice chair of his Committee on Water, Land, and Housing. What got him thinking that there was a need for such an entity was seeing opportunities in his home district being unused. For example, he said, many people would like to see a fishing lodge built at Lake Wilson or a marina developed at Hale’iwa small boat harbor. Such projects, he said, would bring much-needed employment and economic opportunities to his depressed area.



Act 153: Raising the Threshold For SMA Permits

This act (House Bill 117) raises, from \$125,000 to \$500,000, the threshold above which developments within the Special Management Area of the state are required to obtain an SMA major use permit.

Most of the county planning agencies offered strong testimony in support of the measure, noting that the \$125,000-valuation had not been increased since 1991. The Office of Planning supported a repeal of the value-based threshold altogether, but acknowledged that some counties “are concerned that a permitting process based solely on discretionary considerations without cost thresholds would require far greater effort and expense in evaluating SMA permit applications.” The OP’s proposed compromise – setting the threshold at \$250,000 – was rejected in favor of the higher value.

The Office of Hawaiian Affairs opposed the measure, saying it would result in “an increase in the amount of minor SMA permit applications, which will lack the depth of

information compiled for an SMA use permit through public hearings and the completion of environmental review under Chapter 343.” Several environmental groups and numerous private citizens submitted testimony in opposition as well.

When the bill reached the Senate, the committees on Water, Land and Housing, chaired by Donovan Dela Cruz, and Energy and the Environment, chaired by Mike Gabbard, inserted a significant amendment that gives a pass to the Department of Land and Natural Resources’ Division of Boating and Ocean Recreation. With the enactment of this bill into law, DOBOR no longer needs to obtain any SMA permit, be it major or minor, for any construction work at the state’s small boat harbors.

The DLNR provided no testimony on the matter. According to Dela Cruz, it was his idea to put the exemption into the bill. When small boat harbors were under the jurisdiction of the Department of Transportation, he said, there was no requirement for SMA compliance. All he was doing was restoring the way things used to be, he said. Small boat harbors were last under the DOT’s umbrella more than two decades ago.



Act 45: EIS Exceptions Are Extended for Two Years

In 2009, the Legislature carved out a temporary exemption to Chapter 343, the state’s environmental disclosure law. The exemption (Act 87) generally allows projects that involve work in public highways or rights-of-way, but which do not require discretionary permits or which are ancillary to other projects, to proceed without preparation of an environmental impact statement or environmental assessment. In the absence of Act 87, any project that involved the use of state or county lands – such as installation of utility lines, private driveways, sewer lines, and the like – pulled one of Chapter 343’s “triggers.”

With Act 87 set to expire on June 30, 2011, House Bill 424 was introduced, giving the exemption another two years of life (to July 1, 2013).

The bill received enthusiastic support from the Department of Transportation, utility companies, developers, and even the Office of Environmental Quality Control, which is to give the Legislature a report on the effectiveness of Act 87 before the start of next year’s legislative session.

The only testimony in opposition was

submitted by Denise Antolini, director of the Environmental Law Program at the University of Hawai’i’s Richardson School of Law and co-principal investigator of the University of Hawai’i research team that conducted a two-year study of Chapter 343 at the request of the 2008 Legislature.

House Bill 424 contained no justification for the extension of the exemptions, she noted, adding: “If an extension is granted, then the Legislature should require an objective analysis that the extension continues to be warranted.

“Whatever the motive, the mis-interpretation in the past by some state agencies of the scope of the state’s environmental review law is not a sound policy reason for continuing this kind of piecemeal change to Chapter 343.

Two bills that would have implemented, in part, the changes proposed by Antolini’s team were Senate Bill 729 and Senate Bill 699. The former was intended to strengthen the Environmental Council. Despite supportive testimony, it did not emerge from House committees. The second bill, which would have set up a fee-based special fund to support modernization of the OEQC, made it to conference committee but did not cross the legislative finish line.



Act 78: DOCARE Gets Special Enforcement Fund

The DLNR’s ability to enforce its laws and rules has been weak, especially in the area of the coastal and near-shore resources. To give the DLNR’s enforcement arm, the Division of Conservation and Resources Enforcement (DOCARE) a boost, two private foundations – Conservation International (based in Virginia), and the local Harold K.L. Castle Foundation – had offered substantial grants to the agency. However, with no special fund, the DLNR lacked the ability to receive them and at the same time assure the donors that the funds were being used for the intended purpose.

As DLNR administrator William Aila said in testimony favoring House Bill 1082, “While the Department can accept and establish trust accounts to manage a one-year grant from foundations, multi-year non-governmental funding should be placed into an established and dedicated account.”

House Bill 1082 was introduced to cure that. It passed both chambers without recorded opposition and a spending limit of \$250,000 was set for the current fiscal year.



Act 28: Sugar’s Lasting, Costly Legacy

Ever since sugar plantations went out of business across the islands, the public has learned of sites they left behind that require cleanup before they can be put to new uses. One of the most notorious of these is in the Kapolei area, in west O’ahu. In 1994, the state paid landowner James Campbell Estate more than \$30 million for 1,100 acres, taking the property “as is.” In 2004, the Department of Hawaiian Home Lands took ownership of 318 of those acres, hoping to eventually build 1,100 houses for Native Hawaiian beneficiaries.

Before that could happen, the DHHL needed to address serious contamination on .6 acres, where Amfac had had a pesticide mixing and loading plant. The DHHL had a report prepared on cleanup options, showing a range of costs – from a low of nearly \$2 million to cap the site, to a high of up to \$17 million to excavate the contaminated soil. (For more background, see articles in the September 2010 and July 2001 issues of *Environment Hawai’i*.)

The DHHL received a grant of \$200,000 from the federal Environmental Protection Agency to help with initial work. In 2009, the agency signed an agreement to receive a \$1.97 million loan from the state’s Brownfields Cleanup Revolving Loan Fund. The amount represented nearly all of the fund’s \$2 million balance at the time, which was provided by a grant from the EPA.

This is the background to House Bill 1015. The Department of Business, Economic Development, and Tourism, which administers the fund, was given a limit of just \$1 million in disbursements from the fund for the current fiscal year. However, the EPA required the entire grant to be disbursed by the end of the fiscal year (June 30).

Acting with appropriate haste, the Legislature passed the measure, and the governor signed it into law as Act 28. According to DBEDT, repayment is promised in 2012. The DHHL has told the EPA that remedial action at the site should be completed by the end of this year.



Act 69: Spreading the Pain Of a Renewable Portfolio

The title of Senate Bill 1347, “relating to public utilities,” gives little clue as to its

real effect. It began life as a modest measure, instructing the Public Utilities Commissions to accept electronic filings.

But on March 14, at a hearing of the House Committee on Consumer Protection and Commerce, Kevin Katsura, the associate general counsel of Hawaiian Electric Company, proposed an amendment to the bill that changed it into a measure that will almost certainly have wide-ranging, and expensive, consequences to most customers of HECO utilities across the state.

What Katsura proposed was language that would let the PUC allow HECO to place a biofuel surcharge on the bills of electric consumers. Earlier this year, HECO had proposed just such a scheme to the PUC in regards to the agreement between its Big Island subsidiary (the Hawaiian Electric Light Company, or HELCO) and Aina Koa Pono, calling for annual purchases of some 16 million gallons of biodiesel a year from a plant that Aina Koa Pono proposes to build in Ka'u. On August 2, the PUC will hold hearings on the proposal, in Hilo in the morning and in Kona in the afternoon.

Katsura appealed to the committee, chaired by Robert Herkes (whose district includes Ka'u): "The purpose of this amendment is to clarify the legislative intent that the renewable portfolio costs of an electric utility and its affiliates may be aggregated and allocated among the customers of the utilities when the electric utility and its affiliates are aggregating their renewable portfolios in order to achieve the renewable portfolio standard."

The language Katsura drafted would have specifically allowed the PUC to let HECO allocate among customers of all its utilities (Maui Electric, HELCO, and Hawaiian Electric, on O'ahu), whatever surcharge for biofuels it had to pay in order to meet its renewable portfolio standard.

Chris Eldridge, a partner in Aina Koa Pono, told the committee that if HECO were not allowed to allocate its costs among all utilities, "large-scale biofuel projects like AKP will not succeed."

The contract between his company and HECO "is the cornerstone on which AKP is financing and developing the project," Eldridge said in his written testimony. "Although biofuel will soon be cheaper than petroleum-based oil, it will be more expensive for the first few years while the industry is developing. The state cannot expect Hawai'i island rate-payers to shoulder this increase in utility costs by themselves, when the project will open a new industry in Hawai'i, will significantly advance the statewide goals of developing clean and independent energy

sources, and will insulate the state from spikes in the price of petroleum fuels. Accordingly, any short-term rate increases in utility rates as a result of this project should be allocated across the state."

The bill passed out of both chambers with the language HECO's counsel had drafted pretty much intact. It was signed by Governor Abercrombie and became Act 69.

(A postscript: In its latest filing with the PUC, HECO is excluding its Maui subsidiary from the surcharge proposal so that now it will only apply – if approved by the PUC – to ratepayers on the Big Island and O'ahu. On August 2, the PUC will hold hearings on the proposal in Hilo and Kona. An O'ahu hearing was scheduled for August 4.)



Act 178: South Kona Wilderness, Round Two

For the last 40 years, various proposals have been floated to establish a wilderness park in South Kona. The first was made in 1971 by the Association of Hawaiian Civic Clubs, supported by the Bishop Museum, a year after the Hawai'i County Council asked the Navy to cease practice bombings in the Honomalino and Okoe ahupua'a. Several legislative resolutions were adopted since then, calling for the Department of Land and Natural Resources to conduct studies. One adopted in 2001 finally seemed to get traction, spurring the department to prepare a report on actions needed to make the park happen.

Partly on the basis of that report, in 2003, the Legislature passed House Bill 1509 (Act 59), establishing a wilderness area of 22,000 acres from Miloli'i south to Manuka, extending from the shore to 6,000 feet inland. The area included nearly 8,000 acres of land in the ahupua'a of Kapu'a owned by private parties, with the majority interest being held by companies affiliated with Honolulu developer Jeff Stone. Back then, Stone supported the measure, which called for the state to acquire private holdings through a value-for-value exchange of other state lands (with the appraisal costs to be borne by the private parties). In an interview with *Environment Hawai'i* that year, Representative Robert Herkes, one of the prime movers behind the legislation, said that Stone's support was tied to another measure that gave Stone a \$75 million tax credit over ten years in return for developing an aquarium at the Ko Olina Resort and for acquiring the Makaha Resort and dedicating a portion of it for use as educational and training facilities. Stone,

Herkes said, even made a video about the resources in the lands of Kapu'a, which Herkes showed to members of the various committees hearing the bill.

A year later, with no appraisal having been done – and the clock ticking toward the December 31, 2006, deadline by which the wilderness park legislation would expire if the private lands were not acquired – Herkes was pushing for passage of a bill that would have the state pay for the appraisal. When that bill failed to make it out of conference committee, the park was doomed.

Fast forward to 2011. Gil Kahele is the new state senator for the area, appointed by Governor Abercrombie to replace Russell Kokubun, now the head of the Department of Agriculture. Kahele has had a long involvement with the South Kona park idea, first testifying for it in 1985. Kahele introduced Senate Bill 1154, with language identical to that of the 2003 measure.

This year, however, Jeff Stone was not supportive. In testimony to committees hearing the measure, Abbey Seth Mayer, the former head of the state Office of Planning and now vice president for Government Relations of Stone's The Resort Group, listed the numerous reasons why the 7,780 acres owned or controlled by Stone companies should not be included. The same reasons existed in 2003 as well, but Stone had no objection then. Now, however, Mayer cited concerns with regulatory taking issues owing to automatic reclassification of Agriculture land into the Conservation District, prohibitions on subdivisions and construction, and appraisal costs being borne by private owners. In addition, Stone was now objecting to the "value-for-value" exchanges. "TRG notes that during the effective period of Act 59, several ideas for state lands exchange were explored," Mayer wrote. "In all of these cases, regardless of valuation issues, TRG found that potential land exchanges were very controversial, in that there is a great deal of public sentiment and often complicated legal histories tied to state public lands. **TRG would ask the state to authorize condemnation or sale for cash as the only method for acquisition of the Lands of Kapu'a**" (emphasis in original).

Joining in the opposition were the Land Use Research Foundation of Hawai'i and the Attorney General's office. Testifying in support were numerous residents of Miloli'i and attorney James Case, who mounted a vigorous argument that the bill did not constitute a taking since it would not deprive a landowner of "ALL economically beneficial use of the property."

By the time the bill emerged from conference, the lands of Kapu'a had been removed

from the wilderness boundaries and the automatic redistricting of all land into the Conservation District went with it.



'Aha Kiole Council Bill Is Vetoed

One bill that did not make it into law, despite the Legislature's best efforts, was Senate Bill 23, which would have set up permanently an 'Aha Kiole Advisory Council within the Department of Land and Natural Resources. The council would have advised the Legislature and the chairperson of the Board of Land and Natural Resources on "issues related to land and natural resource management through the 'aha moku system, a system of best practices that is based upon the indigenous resource management practices of moku (regional) boundaries, that acknowledges the natural contours of land, the specific resources located within those areas, and the methodology necessary to sustain resources and the community."

The eight council members were to be selected by members of 'aha moku councils, though the bill was silent as to how those would, in turn, be selected. The bill gave the council an initial two-year appropriation of \$129,000 to hire an executive director; it promised that members would be reimbursed travel expenses associated with meetings, but made no provision to pay for that.

Governor Abercrombie announced his intention to veto the measure, saying there was little provision for oversight and that it called for the use of public funds for an entity whose members are self-selected without confirmation, have no term limits, and cannot be removed for cause.

The bill, introduced by Brickwood Galuteria, received support from several Hawaiian Civil Clubs. Among those submitting testimony was Kitty Simonds, president of the Maunaloa Hawaiian Civil Club and also executive director of the Western Pacific Fishery Management Council. As Simonds noted in her testimony, Wespac "supported this initiative since 2006. ... The Aha Moku system working together with the regional fishery management council, will strengthen the support for sustainable management of the ocean and land natural resources."

Wespac's (and Simonds') involvement with the 'Aha Kiole council in the past has sparked much criticism and controversy. It led at one point to charges that she, as a federal employee, and the council, as a federal agency, were improperly involved in lobbying state officials. Although a report from the Depart-

Ordnance Survey Raises Concern Among 'Ahihi-Kina'u Managers

It's not a done deal yet, but the U.S. Army Corps of Engineers is on its way toward clearing south Maui's 'Ahihi-Kina'u Natural Area Reserve of unexploded ordnance deposited during the 1940s, when the Navy used the area for target practice and as a mine-burying site.

At its June 20 meeting in Honolulu, the state Natural Area Reserve System Commission voted to delegate its authority to Department of Land and Natural Resources (DLNR) staff to help craft conditions for a right-of-entry permit to allow the Corps to begin an in-depth survey of the NAR.

The state Board of Land and Natural Resources will need to approve the permit, which is being prepared by the department's Land Division in collaboration with the Division of Aquatic Resources (DAR), the

ment of Commerce's inspector general found no overt wrongdoing, Simonds was given clear instructions on circumstances under which she could testify for Wespac. (*Environment Hawai'i* has reported on Wespac's involvement with the 'Aha Kiole and 'Aha Moku committees over the last several years.)

— **Patricia Tummons**



PHOTO: DLNR

state Historic Preservation Division, and the Division of Forestry and Wildlife, which administers the NARS program.

Once approved, the Corps and its contractor will be able to survey the 1,000-acre NAR, including marine areas, for ordnance and to take samples to determine if munitions have contaminated the soil. The survey will allow the Corps to determine the extent and type of any remediation necessary to protect the public.

The Corps confirmed the presence of munitions within the NAR in 2008 by walking the various trails that criss-cross the



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reserve. It has already had to remove ordnance from an anchialine pond.

If bombs are found fused to the rock, they will be destroyed in place within about a day or two of discovery, Ryan Yamauchi told the NARS Commission during his presentation in June. Yamauchi is president of Element Environmental, the Corps' contractor.

Any fused bombs to be destroyed will be covered by sandbags. And instead of blowing up the bombs, which can be as large as a football, his staff will try to simply break them apart with a low dose of explosives, Yamauchi said.

Element Environmental plans to survey the marine portion of the NAR using unmanned sonar and video devices.

At the June meeting, NARS commissioners voiced concerns that the company's policy to destroy fused munitions within 48 hours may not allow managers to survey the area's resources or collect material they might want saved. (Waiting any longer than 48 hours would require the posting of a round-the-clock guard, which would increase expenses, Yamauchi said.)

Commissioners, as well as DAR's Dave Gulko, also expressed their dismay that DLNR staff would not be participating during the marine and terrestrial surveys. Gulko said he was particularly concerned about the potential for the automated survey equipment to damage coral.

"Having DAR staff go along would help minimize impacts," he said, adding that the area is subject to strong currents, wave action, and wind and has a very complex substrate.

Gulko warned that despite permitting exemptions provided by the federal laws

governing the cleanup, "We are allowed to provide permits. ... The federal government is not exempt." He added that 'Ahihi-Kina'u, the only NAR in the state to include both terrestrial and marine areas, probably represents the most important marine environment in the Main Hawaiian Islands.

The fact that Element Environmental's marine biologist for the project hailed from Florida was also brought up by Gulko. Because the reserve includes such a unique marine habitat, "bringing in expertise from outside the state without any staff monitoring, it's questionable whether they are going to be able to determine the risks."

To Yamauchi, however, having outside staff under his company's supervision posed too great a liability and would increase project costs.

"Technically, our UXO [unexploded ordnance] tech will have to be out there with whoever is there. ... The hard part is if [DLNR staff] signs our safety procedures and they get hurt, do we become liable because they were following our safety procedures?" he said.

NARS commission chair Dale Bonar suggested an arrangement whereby DLNR staff would be present during the survey, but not under the guidance of Yamauchi's staff.

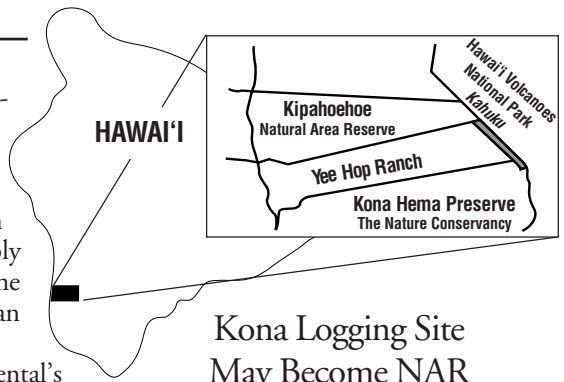
That didn't satisfy Yamauchi.

"We're required to have so many safety experts for the people out there. ... It will increase our costs," he said.

"But if it increases your productivity and effectiveness, it may be worth it," Bonar said.

A Corps representative assured Bonar that his agency would consider the proposal and try to work something else out if it proved unfeasible.

The Land Division has not said when it will bring its permit recommendation to the Land Board, but Yamauchi said he expects the work will take a little more than two months to complete.



Kona Logging Site May Become NAR

The site of one of the Land Board's largest violation cases may become part of the Kipahoe NAR in south Kona.

The 169-acre sliver of land, wedged between Yee Hop Ranch and the Kahuku section of Hawai'i Volcanoes National Park, is where loggers working with Damon Estate illegally removed some 200 trees in the late 1990s.

In 2003, the Land Board fined the loggers more than \$1 million for taking trees from state land, but the case remains unresolved, as the loggers continue to contest the state's ownership of the land in federal court.

Although the land lies in the state Agricultural District, a June proposal to the NARS Commission notes that it also contains 'ohi'a dry forest, montane shrubland, pioneer vegetation on lava and koa-'ohi'a montane mesic forest.

"The latter native community is the most diverse and likely to contain rare species," it states. It adds that, with restoration, the parcel could provide habitat for such rare species as the endangered Hawai'i creeper (*Oreomystis mana*), the 'akepa (*Loxops coccineus coccineus*), the 'io (*Buteo solitarius*), 'akiapola'au (*Hemignathus munroi*), and the 'alala (*Corvus hawaiiensis*).

The parcel is also adjacent to The Nature Conservancy's Kona Hema preserve and contains a road that would facilitate access to adjacent conservation lands, the report states.

— T.D.

