Volume 25, Number 6 December 2014

Environment Hawai‘i
a monthly newsletter

Price: $5.00

Power Struggle

Maybe the new approach to energy generation that the Kaua‘i Island Utility Cooperative is proposing will be a game-changer, bringing cheap, reliable power to the island's residents without using fossil fuels or other non-renewable resources.

But before that can happen, the utility needs to surmount any number of pretty high hurdles, as Teresa Dawson explains in this month's cover story.

On the same subject of renewable power, we report on the latest legal challenges faced by Hu Honua in its efforts to develop a biomass-fueled power plant on the Big Island.

Also in this issue: We report on the refusal of the Western Pacific Fishery Management Council to bow to scientific advice with respect to setting catch limits for prized bottomfish and disclose the costs to the public of the council's lobbying efforts against the expansion of the Pacific Remote Islands Marine National Monument;

We describe an ongoing dispute in Kona over whether a permit was needed for the clearing of a four-acre parcel, said to have damaged historic sites; was it grubbing or merely "mowing," as the owner claims?

And our regular Board Talk column looks at a couple of difficult North Shore cases that recently came before the state Land Board.

IN THIS ISSUE

Kaua‘i Pumped Storage Project Wins Preliminary Approval of Land Lease

As a way to boost Kaua‘i's capacity to incorporate more solar power onto the electrical grid, the Kaua‘i Island Utility Cooperative's proposed pumped storage hydropower project using old sugar plantation infrastructure seems like a no-brainer.

But with an independent power producer closely allied with the irrigation system's manager competing for some of the same resources, a strong desire by the Department of Hawaiian Homelands to fund and build its homestead in the area, and a petition from local residents calling for an end to water waste and the return of stream flows, support for KIUC's West Kaua‘i Storage Project has been far from unanimous.

On November 14, the state Department of Land and Natural Resources' Land Division recommended to the Board of Land and Natural Resources that it approve in principle KIUC's request for a direct 65-year lease for the state's Pu‘u Lua reservoir, a pipeline easement, and a direct lease for water rights. It also recommended the issuance of a right-of-entry to allow KIUC to assess the site.

The project would use lands controlled by the DLNR and the Agribusiness Development Corporation, both state agencies, and draw water from the Koke‘e Ditch. KIUC plans to restore Pu‘u Lua reservoir, located on DLNR land above the Mana plain, to its original 250 million gallon capacity and to construct a new 30 million gallon reservoir at a lower elevation and a substation capable of generating 20 megawatts on ADC lands.

The ADC granted permission to KIUC consultant Joule, LLC, earlier this year to conduct site assessments and studies to aid in configuring the project. The approvals requested from the Land Board last month would allow the co-op to do the same on

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PHOTO: DLNR

The Kaua‘i Island Utility Cooperative wants to lease Pu‘u Lua reservoir (pictured here) as part of a 20 megawatt pumped storage hydropower project in West Kaua‘i.

Environment Hawai'i

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NEW AND NOTEWORTHY

A Seal by Any Other Name…: The endangered Hawaiian monk seal has a new name: *Neomonachus schauinslandi,* reflecting its genetic divergence from the Mediterranean monk seal.

The name change reflects recent genetic studies by researchers at the Smithsonian and colleagues in Germany and at Fordham University that indicate the common ancestor of both the Caribbean monk seal, last sighted in 1952, and the Hawaiian monk seal diverged from the Mediterranean monk seal some 6.3 million years ago. Analyses of DNA from skins of the Caribbean monk seal kept in museums as well as morphological examinations led the scientists to propose the new name – actually, an entirely new genus.

Their work, published earlier this year in the journal *ZooKeys,* speculates that the Caribbean and Hawaiian seal species became separated when a natural channel linking the Atlantic and Pacific was closed by the formation of the Panamanian isthmus between three million and four million years ago.

Although the Hawaiian and Mediterranean monk seals are no longer in the same genus, they do share one important characteristic: both are critically endangered, with around 1,100 Hawaiian monk seals and some 900 Mediterranean monk seals representing the entire known population of these two distantly related species.

OIP Defends Withheld Names: The state Office of Information Practices has upheld the refusal of Governor Neil Abercrombie to disclose the names of unsuccessful applicants for appointment to the Commission on Water Resource Management.

In 2012, *Environment Hawai'i* requested the list of applicants for two vacant positions on the commission. The governor's office refused to disclose the names, prompting the request for an opinion from the OIP.

The OIP issued its memorandum opinion on our request on November 17, finding that there is no legal basis for disclosure. The opinion, authored by OIP staff attorney Carlotta Amerino and endorsed by Cheryl Kakazu Park, OIP administrator, determined that two exceptions to disclosure allowed in the state's Uniform Information Practices Act apply: first, there is the "clearly unwarranted invasion of personal privacy" that would occur if applicants' names were disclosed; second, there was the frustration of a legitimate government function that would result from the practice of making applicants' names public.

In addition to the public not having any right to know who has applied, the applicants themselves have an expectation of privacy, given "the long-standing policy of not disclosing the lists."

As to the frustration of a government function, the OIP states that "disclosure could deter future applicants who do not desire to be subjected to public scrutiny unless they are appointed, thus reducing the pool of applicants."

Although the OIP defended the withholding of the lists, it does note that withholding the lists is not mandatory under UIPA, and the governor could, if he wished, choose to disclose the names of all applicants. "OIP would, however, respectfully recommend that the intent to make such a disclosure be announced prospectively at the time applications are solicited … so that the CWRM applicants … are on notice that their privacy interests are thus diminished," the opinion states.

Pepe'ekeo Point Update: Big Island builder Scott Watson and his California partner, Gary Olimpia, have been dealt another setback by the Hawai'i County Windward Planning Commission. As we reported earlier, the commission in September refused to approve their request to amend the original Special Management Area permit for the larger subdivision in a manner that would legitimize the house site on the lot where Watson has already laid much of the foundation for the 7,500-square-foot "Pepe'ekeo Palace" he and Olimpia are building.

Attorney Steve Strauss asked the commission to reconsider the SMA amendment application, and on November 6, it was on the commission's agenda. Despite Watson's having encouraged several friends and associates to testify on his behalf, commissioners were unmoved.

After hearing Strauss's presentation, commission chair Myles Miyasato asked for a motion. As at the September meeting, no motion was forthcoming, and the request was deemed to be denied.

Quote of the Month

"We have been relegated to a status lower than corals, seabirds, marine mammal, and all other protected species."

— Roy Morioka, bottomfish fisherman

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $65 individual; $100 non-profits, libraries; $130 corporate. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 190 Keawe Street, Suite 29, Hilo, Hawai'i 96720.
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E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
Twitter: Envhawaii

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: For Color Publishing

ISSN 1050-3285

A publication of Environment Hawai'i, Inc.

Creditor Owed $30 Million Presses Forward With Foreclosure Action against Hu Honua

Over the last year, Hu Honua Bioenergy, LLC, builder of the proposed biomass-fueled, 28-megawatt power plant on the Big Island coast a few miles north of Hilo, has faced multiple applications for mechanic's and materialman's liens filed by contractors and subcontractors. Now Hawaiian Dredging Construction Company, Inc., the largest of the lienholders, has brought a foreclosure action against the plant's owners in an effort to force payment of bills in excess of $30 million.

Attorneys for Hawaiian Dredging, the former general contractor on the site, filed the foreclosure suit on October 27 in 3rd Circuit Court. The filing came just days after Judge Glenn Hara approved the company's lien application, in the amount of $29,411,422.69.

John Sylvia, a principal of Hu Honua, has said that the company intends to pay off Hawaiian Dredging. He told the *Hawai'i Tribune-Herald* that the company "intends to clean all this mess up…. I understand some of [Hawaiian Dredging's] irritation. Unfortunately, these things are complicated and they take time to clean up."

Pressure to Subordinate

The events laid out in the lawsuit suggest that promises by Hu Honua to pay its debt to Hawaiian Dredging are nothing new. According to the complaint, in 2012, Hawaiian Dredging began work to refurbish the old power plant, which had burned bagasse, then coal, until shutting down in 2008. By the middle of 2013, Hu Honua had already fallen "significantly behind in paying [Hawaiian Dredging's] and other contractors' and subcontractors' invoices for services and labor performed and materials purchased."

A year ago, Hu Honua informed Hawaiian Dredging that it would be able to obtain funds from NIV, LLC (another defendant in the lawsuit) to pay off Hawaiian Dredging's claims only if Hawaiian Dredging and other creditors agreed to subordinate their claims against Hu Honua to any claims of NIV. Of the $6.5 million to be loaned by NIV, the lawsuit states, just $4.5 million would be available to Hu Honua to pay down Hawaiian Dredging's balance; the remaining $2 million would be retained by Island Bioenergy, LLC (IBE), the sole member of Hu Honua.

Hawaiian Dredging was not tempted, and on December 18, 2013, it informed Hu Honua that it was "unwilling to subordinate our $32 million mechanic's lien."

Hu Honua did not give up. On December 30, after another creditor had filed an application for a lien in the amount of $215,174, Hu Honua pressed Hawaiian Dredging to enter into a "standstill agreement," calling for Hawaiian Dredging to hold off on any legal action to collect its debt. When that didn't work, Hu Honua asked for a "revised standstill agreement," stating: "We have drafted this agreement in a manner that allows us to move forward with the bridge lenders, who need some assurance that the project contractors are not going to start exercising remedies before the next round of construction financing is secured…. It is in everyone's interest to not have the subcontractors file lien notices or to start any lawsuits."

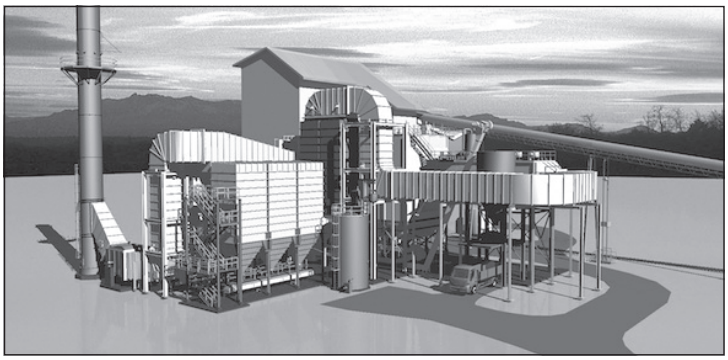

PHOTO: HU HONUA

Rendering of refurbished plant at Pepeekeo.

Again, Hawaiian Dredging held firm. But Hu Honua continued efforts to induce the company to subordinate its claims to those of NIV, the "bridge lender." "We would like to avoid a lien debacle," Hu Honua wrote on January 10, 2014, "as it would only prolong [sic] complicate the financing process which is in neither of our interests."

Not waiting for Hawaiian Dredging to reply, that same day Hu Honua mortgaged to Island Bioenergy all its personal property as well as its leasehold interest in the land and its interest in any of the improvements on it. Island Bioenergy (IBE) then turned around and assigned the mortgage to NIV. In return, the Hawaiian Dredging complaint states, NIV agreed to loan IBE up to $35 million, and IBE in turn agreed to loan a like amount to Hu Honua. Before the month was over, Hawaiian Dredging filed its lien application with the 3rd Circuit Court.

Over the next several months, Hawaiian Dredging perfected its claims against Hu Honua. In April, both companies entered into a settlement agreement, later approved by the 1st Circuit Court, that called for Hu Honua to pay Hawaiian Dredging $30 million. In mid-October, Judge Glenn Hara of the 3rd Circuit Court approved the lien application filed last January.

'Fraudulent Transfers'

But beginning last July, attorneys for NIV attempted to assert what they said was a superior claim to Hu Honua's assets. In a letter dated July 16, the complaint states, NIV's counsel informed Hu Honua that the mortgage "will be superior to any mechanics lien that may be filed by HDCC" and that "a trustee's sale of HHB's assets will result in a purchaser taking the assets free of any mechanic's liens filed by" Hawaiian Dredging.

This, Hawaiian Dredging attorneys say, was basically an admission that HHB, Island Bioenergy, and NIV had planned "to hinder, delay, or deny [Hawaiian Dredging] the ability to be paid for its claim for unpaid invoices." The back-to-back mortgages in January had been done without notice to Hawaiian Dredging. "HHB concealed from Plaintiff the existence and extent of its security interests and obligations to IBE that were created on January 10, 2014, and immediately transferred to NIV," the complaint says — this despite HHB having "a duty to disclose … the facts that the Loan and Transfers would not be used to pay any portion of plaintiff's claim and were instead undertaken with the intent to hinder, delay, or defraud Plaintiff from collecting on its claim against HHB."

The effect of those mortgages became clear when, in early September, NIV sought to intervene in the special pleading in the 1st Circuit. Hawaiian Dredging had been pushing for a court order to force the sale of assets held by Hu Honua when NIV "applied to intervene … and demanded that HHB be provided full access to and use of its real and personal property." NIV could make the demand, NIV's attorneys stated, because

Kona Man Accused of Destroying Sites Challenges County over Grubbing Law

What's the difference between "grubbing" and "mowing"?

That was the question posed to the Hawai'i County Board of Appeals earlier this year, as a Kona landowner challenged the accusation he had violated the county's prohibition on grubbing without a permit. The landowner, Richard "Rusty" Stewart, claimed that a contractor he had hired in February 2013 had merely mowed — but did not grade or grub — the bulk of some four acres of land Stewart owns lying makai of the Mamalahoa Highway and just north of houses lining the steep, well-traveled Kaiminani Drive that leads to the Kona airport.

Despite Stewart's claim that no trees were uprooted, and hence no grubbing had occurred, the Board of Appeals upheld the correction notice that the Department of Public Works had issued. The action sets the stage for the State Historic Preservation Division (SHPD) to move forward on its own claims that Stewart's actions caused serious damage to protected Native Hawaiian archaeological sites.

Cleared to Mow

According to Stewart's testimony, he had called the county Department of Public Works and the state Department of Health's Clean Water Branch in early 2013 to ask whether he would need a permit to mow the property. On being informed that none was required, he said, he contracted for the clearing to be done.

Once work began, around February 13, a neighbor was alarmed by what she saw. A 33-ton steel-tracked excavator with a flailing head — imagine a Brobdingnagian weed-eater with a 40-foot swath — was crawling over the densely vegetated property. Acting on her complaint, Robert Northrop, an inspector for the county's Department of Public Works, visited the site. That same day, February 22, Northrop posted a formal notice of correction on one of the still-standing tree-trunks, notifying all who passed that no further work was to be done on the site.

By the time Northrop reached the property, however, the work had stopped and the operator, apparently alerted that an inspector was on his way, was already in the process of removing the excavator from the property. About 80 percent of the lot had been cleared at this point.

PHOTO: DLNR

This photo, says SHPD, shows a destroyed historic mound on Richard Stewart's property.

Only after the correction notice had been posted did the state Department of Land and Natural Resources' Historic Preservation Division (SHPD) become involved, according to a report prepared by Michael Vitousek, the division's lead archaeologist for Hawai'i island.

"On March 11, 2013," he wrote, "Bob Northrop … notified SHPD that a County of Hawai'i Grubbing Permit was required for the land clearing activities" on Stewart's parcel. On the same day, Northrop and Vitousek visited the site, where Vitousek noted eight separate violations of the state historic preservation law, Chapter 6E of Hawai'i Revised Statutes.

While the penalties for grubbing without a county permit are mild — $500 per violation — those for historic preservation violations are sterner: up to $10,000 for each violation. On top of that, if the violator has caused the loss of or damage to any historic property, an additional fine is required in an amount equal to the value of the damaged property. However, a finding that a county violation has occurred is a prerequisite of any finding of a violation of Chapter 6E.

Vitousek prepared a staff report, recommending that the state Board of Land and Natural Resources find that Stewart had violated state law by "altering historic properties without a county approved grading and grubbing permit." The report was placed on the Land Board's agenda for December 13, 2013. However, as the meeting began, board chair William Aila announced that the item had been withdrawn. The DLNR's public information officer, Deborah Ward, said it was because Hawai`i County had not yet made the determination that Stewart had, indeed, violated the county's grading and grubbing ordinance.

Now that the county's correction notice has been upheld, the way is clear for SHPD to press forward with its case once more. *Environment Hawai'i* asked for comment from SHPD, but had no answer by press time. If, however, Stewart goes to court to challenge the Board of Appeals decision, as he indicated to *Environment Hawai'i* was a distinct possibility, the SHPD action will once again be put on hold.

Muddled Narratives

As to what occurred after the work began, narratives from the parties involved diverge. All appear to agree that Northrop visited the site on February 22 and posted

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"NIV has a first secured priority position in all improvements." Any restriction on work at the site "has and will directly and immediately devalue NIV's collateral."

In any case, NIV continued, "[g]iven NIV's prior secured interest on its $35,000,000 loan," and its senior claim on liquidated assets, even if Hawaiian Dredging were able to force a sale of Hu Honua assets, Hawaiian Dredging probably would "receive negligible proceeds at best."

The special pleading in 1st Circuit has been assigned to a mediator. In the meantime, Hawaiian Dredging has filed a *lis pendens* on the real property leased by Hu Honua and owned by Maukaloa Farms, LLC.

Efforts to reach a spokesperson for Hu Honua were unsuccessful by press time. Keith Yamada, attorney for Hu Honua, declined to comment on pending litigation. ***— Patricia Tummons***

the correction notice on that day.

But in his appeal of the correction notice, Stewart states that this was *after* SHPD had been to the property — and he goes on to claim that it was a visit from SHPD on February 20 that resulted in work on the site to cease.

From all this, Stewart concludes that "undo [sic] influence by SHPD has lead [sic] to this arbitrary decision and unwarranted exercise of discretion."

According to Vitousek's report, however, he did not visit the site until more than two weeks later, around March 11, 2013. On that date, his report states, he was notified that a grubbing permit was required for the land clearing activities, and it was this notification, he continues, that led to a field investigation. "Mr. Northrop escorted Mr. Vitousek onto the property, where extensive mechanical clearing activities were noted," Vitousek wrote. "Mr. Vitousek recorded 8 violations," including:

• A possible pre-contact habitation site that had been altered by the land-clearing activities; "Observable alterations include recent scarring on rocks likely caused by a steel track excavator passing over it. Additionally, stones in the face of the platform were pushed over;"

• Two large depressions were in a wall of a "large dry-stacked stone enclosure" in the northwest corner of the parcel, "where the excavator appears to have passed over the wall to enter the enclosure. The stones … have been reduced to rubble;"

• A dry stacked retaining wall had been damaged; "Partial wall collapse is probably caused by mechanical arm of the excavator;" and

• Two pre-contact agricultural mounds had been damaged. One had been run over and flattened by an excavator, while a large segment of the second one had been destroyed following an excavator running through it.

The full extent of damage to historic sites "is unknown due to the thick layer of wood chips and organic debris that covered the project area," Vitousek wrote in his field report of March 25, 2013.

'What About the Stewart Matter?'

Stewart insists that neither he nor his contractor did anything that approached the definition of grubbing or grading in the county's ordinance. Even if the steel tracks of the excavator disturbed the ground, he notes, up to an acre of ground – or a fourth of his land in Kona – could be cleared under county law without need of a permit of any kind.

Further, he says he was completely blindsided by the SHPD report submitted to the Land Board in December 2013. After the county inspector posted the correction notice on his property, all work ceased – and Stewart says he thought that was the end of it.

After the vegetation was cut, Stewart hired an archaeologist to survey the site, a needed step before the property could be subdivided, as Stewart intended to do. He told *Environment Hawai'i* that vegetation on the property was so thick that no survey could be done, which was one of the reasons he contracted to have the "mowing" done.

By this time, Stewart says, he had been in touch with the Reverend Norman Keanaaina, whose family had once owned the property. Keanaaina informed him that there were no historic sites on the land — that his family had farmed there and had built sheds and corrals, and that his mother had even allowed contractors for the houses along Kaiminani Drive to remove rocks from the property for walls and fill. Keanaaina's letter, says Stewart, undercuts Vitousek's claims that numerous Hawaiian sites were damaged or destroyed. After getting the Keanaaina letter, he said, "I thought there's nothing there."

> *"Somebody has got it in for me... They don't want me to develop my property."*
> ***— Richard Stewart***

"So months go by," Stewart said. "The archaeologist completes his report. I called up my lawyer, ask him what's going on. I find out my archaeologist, Alan Haun, had been talking to Pua [SHPD administrator Pua Aiu], and she asks him, 'What about the Stewart matter?' She says, 'We've got him up for hearing this Friday.'"

Stewart says that this was the first he knew of the pending Land Board action against him, with a proposed fine of $10,000, scheduled for December 13, 2013. His attorney managed to get the item continued, while Stewart tried to get the county Department of Public Works to rescind the correction notice.

After Warren Lee, head of the DPW, stood by his inspector's decision to issue the notice, Stewart filed his appeal with the county Board of Appeals.

Due Process

The Board of Appeals hearing was continued on several occasions, but finally, on October 10, Stewart was given the chance to defend his actions. One of the key points he raised in his appeal was the vagueness of the county's grading and grubbing ordinance. No matter that the excavator on his property weighed 33 tons and had a flail that spanned a 40-foot diameter circle, Stewart said, it did not grade or grub. It did not have a blade, and it did not uproot vegetation. It only chipped from the top of the plants down to the ground, leaving in its wake a thick carpet of chips that, when the property was eventually developed, could be plowed into the ground to enrich the soil, he argued.

"The reading of the statute [sic] will clearly show that technically I was not grubbing; therefore no permit was necessary," he testified. "We didn't remove the brush, we didn't denude the property… That is not grubbing according to the current law…. Listen, it should be re-written so that people like me don't make any potential mistakes in the future. But … to make me the poster child, the first one out, is, I think, wrong."

Stewart argued also that the DPW was acting at the behest of someone in SHPD in its refusal to rescind the correction notice. "Mr. Lee even admitted that there has only been a handful of times the state has contacted him about a correction notice, and this was one of them," Stewart testified. "And although [Lee] states that that didn't influence his decision to maintain this correction notice, I think it's quite obvious that it had to, and that therefore it was basically [an] abuse of discretion and arbitrary and capricious."

The Board of Appeals didn't buy into his arguments, voting unanimously to uphold Lee's refusal to rescind the correction notice.

"What this is is deprivation of due process under the U.S. Constitution, an unlawful taking of property," Stewart told *Environment Hawai'i.* "Somebody has got it in for me. I don't know who, but I do know why: They don't want me to develop my property."

The county corporation counsel was instructed to write up a proposed findings of fact, conclusions of law, and decision and order within 30 days of the Appeals Board decision. According to Stewart, the corporation counsel has asked for – and Stewart granted – a two-week extension, which gave the county until the end of November to complete the report. ***— P.T.***

NMFS, Wespac Butt Heads Over MHI Bottomfish Stock Assessment

The morning of the vote, before the day's meeting officially began, members and staff of the Western Pacific Fishery Management Council huddled with staff from the National Marine Fisheries Service's Pacific Islands Regional Office. Wespac executive director Kitty Simonds, NMFS PIRO administrator Mike Tosatto, and Fred Tucher, regional counsel for the National Oceanic and Atmospheric Administration, did most of the talking, while the others leaned in to listen.

Audience members speculated over what they were discussing so intently. Most likely they were all searching for a way to set a legal, justifiable annual catch limit (ACL) that would not avoid just a lawsuit but also any significant harm to Hawai'i's commercial bottomfish industry, which generates nearly $2 million in revenues a year.

Whether they succeeded remains to be seen. Later that day, October 23, the council chose to stick to its June recommendation that, based on a 2011 federal stock assessment, NMFS should set this year's Main Hawaiian Islands bottomfish catch limit at 346,000 pounds. This despite repeated warnings from NMFS that such a level poses too great a risk of overfishing.

As of press time, NMFS had not adopted the council's recommendation, leaving commercial bottomfish fishermen operating without a catch limit for a season that began in September.

'Superior' Science

In June, Annie Yau, a research biologist with the NMFS's Pacific Islands Fisheries Science Center (PIFSC), presented the council and its Scientific and Statistical Committee (SSC) with draft results of a new stock assessment for the fishery. Unlike the 2011 assessment, the new one included individual fishers' skill in standardizing the catch-per-unit-effort (CPUE) between 1994 and 2013. This change explained more than 50 percent of the variability in observed CPUE, Yau said.

To the chagrin of fishermen as well as the SSC, the "improvement" also resulted in Yau's finding that the 346,000-pound ACL that's been in place for the past few years would have to be reduced by more than 80,000 pounds for the 2014-2015 season to stay below a 50 percent risk of overfishing.

Given the potentially large impact on the fishery, which last year caught about 309,000 pounds, the council voted at its June meeting to keep the ACL at 346,000 pounds, with the expectation that it would revisit the issue at its October meeting and that in the meantime the SSC would confer with NMFS scientists on its concerns over the new assessment.

On August 28, then-PIFSC director Sam Pooley wrote a letter to Tosatto advising him that the center maintained that the 2014 draft stock assessment was superior to the 2011 stock assessment upon which Wespac had based its June decision.

A day later, PIFSC backed up its position in writing in its response to the SSC's numerous proposed changes to the draft stock assessment. Point by point, the center explained how the SSC's various technical suggestions would result in bias or weak data, how they lacked any basis in published literature, how they were already accounted for, or how they simply didn't make any sense.

In one instance, PIFSC pointed out that one of the considerations the SSC proposed for inclusion was something it asked to be omitted years ago. Specifically, the SSC proposed reincorporating the effect of technological improvements in fishing gear into the 2014 stock assessment model. However, PIFSC pointed out that in the 2011, after a CPUE standardization workshop held at the SSC's request, the committee supported leaving technological improvement out of the 2011 model.

PHOTO: NOAA

Bottomfish catch.

"This current suggestion by the SSC contradicts previous SSC comments and support, and the extensive work previously done to address those comments," PIFSC wrote. It also asked the committee for "additional justification to revisit this issue since no additional information has been available since the 2011 assessment, when an extensive exploration of this topic occurred that included discussions with fishers."

Peer review of the stock assessment is expected to be completed this month.

A Warning

Also on August 29, NMFS's Tosatto sent a letter to Wespac chair Arnold Palacios stating that the council's decision to retain the 346,000-pound ACL contradicted National Standards 1 and 2 of the Magnuson-Stevens Fishery Conservation Act.

National Standard 1 requires conservation and management measures to prevent overfishing while maintaining a long-term optimum yield, and Standard 2 requires that those measures be based on the best scientific information available, Tosatto wrote.

Tosatto noted that under the 2014 assessment, the ACL posed a greater than 50 percent risk of overfishing. Under the 2011 assessment, it had only posed a 41 percent risk.

"Because the council's recommendation does not have at least a 50 percent chance of preventing overfishing in 2014-15, it is inconsistent with National Standard 1," Tosatto wrote.

He added that although the 2014 assessment was still a draft when the council made its ACL recommendation, his agency considers it superior to the 2011 assessment. And because the council had not yet received PIFSC's written responses to the SSC's concerns when it made its June recommendation, "the council could not adequately consider information in the 2014 stock assessment that indicated that its ACL recommendation would not prevent overfishing," he wrote.

"Because the Council's recommendation did not consider all of the available scientific information … it is inconsistent with National Standard 2," he wrote.

He closed his letter by advising Wespac to revise its ACL recommendation in October to be consistent with national standards. Failure to do so would force NMFS to take secretarial action to carry out the Hawai'i Fishery Ecosystem Plan, he wrote.

Options

At the October meeting, Wespac staffer Marlowe Sabater presented several alternatives. The council could stick to its preferred ACL of 346,000 pounds, which would result in $2 million in overall revenue and no closure or fleet loss. It would, however, pose a 55 percent risk of overfishing under the 2014 stock assessment, he said.

A reduction to 307,960 pounds would reduce the risk of overfishing under the 2014 assessment to 49 percent, but would generate only $1.79 million in overall revenue and result in a four-day closure. (The estimated closure length was based on the 2013-2014 catch of 309,000 pounds.) Under the 2011 stock assessment, a catch limit of 307,960 pounds entails a 32 percent risk of overfishing.

If the council wanted to reduce the risk of overfishing under the 2014 assessment to 41 percent — the standard used since 2011 — it would have to reduce the limit to 265,000 pounds. This would result in overall revenues of $1.54 million and a 154-day closure, Sabater said.

When asked by council member Ed Ebisui how best to proceed, Tosatto suggested that if the council insists that the 2011 stock assessment is the best available science, it could decide that a 32 percent chance of overfishing, rather than 41 percent, is appropriate.

The resulting ACL of 307,960 pounds would be consistent with national standards, Tosatto said. Because that would result in a 49 percent risk of overfishing under the 2014 assessment, "we both get our way," he said.

Even though the 2014 assessment wasn't expected to complete peer review until December, Tosatto said his agency felt it would be supported.

The SSC and the council members were unswayed, sticking to their belief that the 2011 stock assessment represented the best available information because it had completed peer review.

NOAA general counsel Tucher, however, advised them that failure to account for superior information (such as the 2014 draft assessment) could be deemed arbitrary and capricious.

When NMFS ultimately sets the ACL, it must account for new information, he continued. "When it's own science center says it's superior, that's going to be very persuasive," Tucher said.

Tosatto could not say whether his agency could legally approve an ACL of 346,000 pounds.

"We're not making a decision about a stock that is over, over healthy, but it's not in trouble, either. … I don't want to close the fishery, but I want to be as productive as we can," he said.

'Loss of Faith'

For the commercial bottomfish fishermen, any ACL reduction based on the 2014 draft stock assessment would lead to a widespread loss of faith in the federal processs across the industry, said Ed Watamura, head of Wespac's advisory panel.

"Imagine if I would spread the word that no matter what the fishermen say, they'll do whatever they want," he said during public testimony. Watamura said he would stop participating in the council process if it reduced the ACL, explaining that he would "no longer believe that my valuable time is worth sacrificing." He encouraged the council to "do the right thing here and fight for it all the way to the top."

> *"I wish I had a boat big enough to take all of you and show you what's really going on."*
>
> ***— Ed Ebisui, III***

Fisherman and former council chair Roy Morioka was just as, if not more, passionate. "This is a travesty, a perversion and a mockery of the Magnuson-Stevens Act," he said, especially because all involved agencies had failed to include fishermen in the stock assessment process, despite being assured they would be included.

"How would you respond if your capacity to earn was reduced by 25 percent … by bureaucratic failures?" he asked.

He promised that if the MHI bottomfishers suffered any ACL reduction, he would no longer participate in fish-tagging, research cruises, any council or federal advisory bodies, and all federal meetings.

"We have been relegated to a status lower than corals, seabirds, marine mammal, and all other protected species," he said. "I have been a long and staunch advocate of the council process, but this matter has shaken my belief to the core."

Commercial bottomfish fisherman Ed Ebisui III, son of Wespac council member Ebisui, contended that MHI bottomfish stocks were doing just fine. And for a new stock assessment to suggest that overfishing might occur if takes aren't drastically reduced made no sense to him.

"With all due respect, Annie, thank you for all the hard work you do [but] your model, when you put in a number and it defies what all of us fishermen are seeing, it blows my mind. … It's like a weatherman sitting in a concrete box saying there's a 100 percent chance of sunshine and doesn't look outside and see it's pouring," he said.

"We're seeing big fish. Lots of them," he said. "I wish I had a boat big enough to take all of you and show you what's really going on."

The Final Vote

In the end, the council, except for Tosatto, not only stuck to its June decision on the ACL and the best available science, but also endorsed the suggestions that had been made to improve the stock assessment. Those included incorporating additional types of data, exploring ways to further divide the Deep 7 species complex into smaller groupings or individual species for further stock assessment, consulting with members of the fishing community before the independent review of the draft stock assessment, and considering technological efficiency changes and the potential bottomfish biomass in the state's bottomfish restricted fishing areas in future stock assessments. ***—Teresa Dawson***

For Further Reading

The following articles are available on the *Environment Hawai'i* website, www.environment-hawaii.org. Click on the "Browse Our Archives" link to be taken to the year and month of publication.

- "Council Maintains Bottomfish Catch Limit, Despite New Evidence It May Be Too High," August 2014;
- "Council Adopts New Limits on Hawai'i Bottomfish Catches," July 2011;
- "Council Once More Increases Quotas for Bottomfish in Main Hawaiian Islands," September 2009;
- "Bottomfish Restrictions May Do Little for Stocks in Main Hawaiian Islands," August 2007;
- "Council Plan for Bottomfish Takes Little Heed of State Efforts," April 2007.

Wespac Spends Taxpayer Dollars to Lobby Against Expanded Pacific Islands Monument

How much did U.S. taxpayers spend to argue *against* the recent expansion of the Pacific Remote Islands Marine National Monument?

Environment Hawai'i asked that question after the Western Pacific Fishery Management Council (Wespac) issued a press release describing a meeting held at the White House on September 9. According to the press release, the council delegation, which "included leaders from Hawai'i, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Western Pacific Regional Fishery Management Council," met with presidential counselor John Podesta, acting head of the Council on Environmental Quality Michael Boots, U.S. Fish and Wildlife Service director Daniel Ashe, and Christine Blackburn, senior advisor to the undersecretary of the National Oceanic and Atmospheric Administration.

President Barack Obama announced in June his intention to expand the reserve by increasing to 200 miles the fishing exclusion zone around all of the Pacific remote islands (Wake, Howland, Baker, and Jarvis islands, Kingman reef and Palmyra atoll, and Johnston atoll). Under the monument as established in 2009 by President George W. Bush, the reserve extended just 50 miles. The proposed expansion would have increased the protected area from 83,000 square miles to more than 750,000 square miles.

Although the press release states that the delegates described catastrophic consequences if the expansion were made as proposed, data included in a slick, four-color, 18-page booklet prepared by Wespac especially for the White House meeting indicated that at no time in recent history did the area proposed account for more than 16 percent of the fishing effort expended by Hawai'i longliners – and that occurred in 2000. In more recent years, fishing by longliners in the area has been even less than that, averaging less than 4 percent since 2008.

According to Wespac's press release, "at the meeting, government officials reaffirmed their support for the monument's expansion, however, they did not explain their rationale or expound upon any supporting facts."

On September 24, the president announced the monument would be expanded to 200 miles around Johnston, Jarvis, and Wake, but that the previously existing 50-mile exclusion zones around Kingman reef, Palmyra atoll, and Howland and Baker islands would remain. Wespac wasted no time in taking credit for the reduction. Another press release, issued that same day, quoted Wespac executive director Kitty Simonds as saying, "We appreciate the White House's compromise on a monument expansion that could have devastated the region's fisheries and communities without notable environmental benefits."

At Wespac's meeting in October, Simonds described how the council "spent the summer trying to convince Obama not to expand the PRIA monument."

"We were partially successful. … I think we did a good job," she said.

> *The total costs of their travel and related expenses came to more than $33,000. The cost of producing the special booklet for the White House meeting came to nearly $1,000.*

Attending the White House meeting at taxpayer expense were seven individuals: Simonds; council members Ed Ebisui of Wahiawa, Claire Poumele of American Samoa, and Arnold Palacios of CNMI; and council staffers Paul Dalzell, Sylvia Spalding, and Eric Kingma. The total costs of their travel and related expenses came to more than $33,000. The cost of producing the special booklet for the White House meeting came to nearly $1,000.

But the Wespac delegation included many others whose expenses were not covered by Wespac – at least so far as the National Oceanic and Atmospheric Administration could determine. These were Ed Watamura, head of the council's advisory panel; Ricardo DeRosa, a purse seiner from American Samoa; Pierre Kleiber, a statistician (now retired) formerly with the National Marine Fisheries Service's Pacific Islands Fisheries Science Center; Makani Christensen, a commercial fisherman in Hawai'i; Neil Kanemoto of the Pacific Island Fisheries Group; Bob Fram, of Garden and Valley Isle Seafood; Roy Morioka, former council member and now involved with the Hawaii Fishermen's Alliance for Conservation and Tradition (HFACT); Tony Costa, a Hawai'i fisherman; Brooks Takenaka of the Honolulu Fish Auction; Frank Farm, another former council member and now president of the Ali'i Holo Kai Dive Club; Steven Lee, also of HFACT; and Sean Martin, former council member and president of the Hawai'i Longline Association.

But Is It Lobbying?

Wespac has sailed close to the wind before – and been chastised for it – for lobbying efforts. As a result, it was given clear guidelines by the inspector general of NOAA as to what it might and might not do to lobby government agencies (presumably, including the Council on Environmental Quality) with respect to the council's perceived interests. Unless invited to do so by a legislative or executive body, the council was not to approach government agencies with an eye to affecting their decisions.

In this case, however, it would seem as though the CEQ did invite input from the council. In an email July 31, from Franz Hochstrasser, then deputy associate director of the CEQ, to Simonds, the council is invited to "a meeting or call on the possible expansion" of the monument.

A week later, Simonds called Hochstrasser, and then emailed him to confirm the substance of their discussion. "We will participate in a telcon," she wrote, "but it is no substitute for a face to face discussion on a decision as enormous as this one.. … Brian hallman is flying to dc for a face to face discussion. The council, hla and the PAC must have the same opportunity."

(Brian Hallman is executive director of the American Tunaboat Association, a group representing purse seiners. HLA is the Hawai'i Longline Association. PAC is an acronym that is as yet unknown to *Environment Hawai'i.)*

Hochstrasser replied on August 6, stating that he would be "glad to honor your request for an in-person meeting."

Although the meeting was on September 9, hotel bills show the members of the Wespac delegation stayed a minimum of three nights at the Marriott hotel, at a rate of more than $400 a night.

(To see the booklet prepared by Wespac for Congress, visit http://www.wpcouncil.org/wp-content/uploads/2014/09/WPRFMC_CEQ-presentation-rev2014.09.16.pdf.) ***— P.T.***

Reservoir continued from page 1

DLNR land and provide sufficient assurance to justify proceeding with the preparation of an environmental impact statement and a Conservation District Use Application.

The Land Division recommended approval, in part, because of KIUC's plan to improve the Pu'u Lua reservoir so that it meets dam safety standards, a feat that would require the state to expend millions of dollars otherwise.

Land agent Ian Hirokawa told the Land Board that his division would present a recommendation to approve or disapprove land and water leases only after the board approved the EIS and CDUA. All of those approvals would provide opportunities for public comment, he said.

KIUC CEO David Bissell said the closed-loop hydro project, which would recirculate water between high and lower elevations, was relatively innovative for Kaua'i.

He said the island was nearing its saturation rate for solar electricity, but with pumped storage, "we'll be the first in the country using PV [photovoltaics] during the day to make electricity at night."

Joule's Dawn Huff added that she has been working with the ADC and its tenant farmers to try to tailor the project to meet their irrigation needs.

Not So Fast

Despite the project's purported benefits, the Department of Hawaiian Home Lands argued in its testimony that the Land Division's recommendation on the water lease failed to "acknowledge, address, analyze, ensure or protect DHHL's right to water under Section 221 of the [Hawaiian Homes Commission Act] and the state's Water Code."

The DHHL owns 15,061 acres of homestead lands directly adjacent to the project area and the HHCA and Water Code provide the agency with clear legal rights to take water from the Koke'e Ditch, said Hawaiian Homes Commission chair Jobie Masagatani.

She and her department's private attorney, Bill Meheula, expressed their concern that KIUC's project could adversely affect the amount of water available to DHHL for its homesteads and reduce the potential for the agency to develop its own hydropower project.

The DHHL had "engaged in several preliminary exploratory discussions with KIUC regarding the feasibility of a hydro project on these lands and the related financial and infrastructure benefits such a project could bring to expedite the opportunity to homestead these lands," she said.

She estimated that the DHHL's hydro project, which would use the existing Pu'u 'Opae reservior, would require an average stream flow of 15.2 million gallons a day.

PHOTO: U.S. NAVY

West Kaua'i.

Not only did the Land Division's recommendation to the board fail to acknowledge the DHHL's water rights, the DLNR violated state law when it also failed to notify the DHHL about the proposed water lease, Masagatani said. Chapter 171-58 of Hawai'i Revised Statutes requires the DLNR to inform the DHHL of its intent to execute a new lease or renew an existing lease of water rights.

The law, she continued, also states that after the DHHL consults with its beneficiaries, the two departments must "jointly develop a reservation of water rights sufficient to support current and future homestead needs."

She went on to warn against approvals-in-principle and suggested that a contested case hearing, a court-like fact-finding proceeding, would be the more appropriate way to deal with a project that might affect DHHL's rights. She also argued that state law requires the Land Board to inform the public about any proposed renewable energy project on state land with at least two meetings on the island where the project is to be located.

Finally, she testified, the Land Division's report fails to acknowledge an outstanding petition to the state Commission on Water Resource Management calling for an end to water waste by the ADC and its tenants and to amend the interim instream flow standards for Waimea River and its tributaries.

With regard to the DHHL's proposed hydro project, she told the Land Board that it would provide water to the Waimea lands, which are currently cut off from the system.

To Land Board member Chris Yuen, it seemed possible to physically achieve both projects. Because KIUC is only planning to shuffle a fixed amount of water in a closed system up and down a hill, "if Hawaiian Homes wants water from the system, the water goes back up to where it was before and is still available," he said.

Masagatani admitted that her department had only received the proposal two days earlier.

"We haven't had a chance to fully analyze the impacts on our water rights," she said.

Competition

Yuen argued that the way KIUC planned to operate its hydro, with an improved Pu'u Lua reservoir, more water may actually be available to the DHHL if and when the department makes its request for a water reservation.

Masagatani then admitted that part of her problem with the project, apart from how it came to the board, was that it competed with the DHHL's project.

"If the facility is on DLNR lands, it will not be on DHHL lands [and] we do not get the benefit from opening up those lands," she said.

When asked by Kaua'i Land Board member Tommy Oi how far along the DHHL was in developing a hydro plant, Masagatani said the department had had some preliminary discussions and that it was ready a few months ago to draft a water reservation request to the Water Commission. The commission, however, felt that the request needed improving, she said.

She asked that the Land Board defer the matter to allow the DHHL to understand the KIUC project's implications.

Meheula, the DHHL's private counsel, added that the department was concerned that there might only be capacity for one hydro facility in the area and that granting an approval-in-principle would directly or indirectly harm the DHHL's ability to get financing.

"If there is only capacity for one hydro … that could doom our project," he said.

To this, deputy attorney general Myra Kaichi noted that the ADC has been approached with several hydro projects in the area and has not approved any of them so far, although they have been given rights of entry.

"ADC did not do any type of approval-in-principle. They are sitting and waiting for definite plans to come in to analyze. There are competing plans in the area," she said.

Land Board chair William Aila asked KIUC's Bissel whether there was enough electricity demand on the island to support more than one hydro project in West Kaua'i.

Bissell hedged, "That's a difficult question to answer. … It would totally depend on the size and characteristics of that project."

Aila then said that his department was remiss in not fully discussing the proposal with the DHHL.

In addition to the DHHL, Konohiki Hydropower also wants to develop a facility using the state's lands and irrigation system to provide pressurized irrigation water and power to the ADC tenants, and to sell excess power to KIUC. But it's been stymied so far by KIUC's repeated refusals to enter into a power purchase agreement.

Konohiki director Palo Luckett said that for the past five years, his company has developed significant irrigation system improvements in partnership with the Kekaha Agriculture Association (KAA), which represents the ADC tenants and manages the irrigation infrastructure for the agency.

Luckett stressed how important – and expensive – it was to maintain the century-old system, adding that his company already has a lease from ADC for its hyrdo project, which would require about 13 million gallons a day. He also asked that the Land Board defer deciding on KIUC's request.

In partnership with KAA, Konohiki has designed its pressurized irrigation system to direct flows precisely where they're needed, he said.

"While I applaud the local utility's efforts to incorporate more renewable energy … it cannot be done at the expense of agriculture," he said. "An approval-in-principle to lease Pu'u Lua reservoir puts the irrigation water in the electric utility's hands and out of the hands of farmers. We respectfully request this item be deferred so discussions with the current manager of the system can be conducted."

Yuen raised the same point he made to Masagatani about the fact that KIUC's project takes a discrete amount of water.

"So what is the problem?" he asked.

"This is an irrigation system that was constructed for ag. … An electric utility will control what happens to that system," Luckett replied.

Even if that were the case, Land Board chair Aila pointed out that there appeared to be more than enough water for everyone even if the Pu'u Lua reservoir was restored to hold only 150 million gallons.

"If the reservoir is repaired, everyone gets what they want in terms of water, maybe not income from electricity generation," Aila said.

Water Complaint

To Luckett's statement that the ditches and reservoirs were part of an irrigation system, Earthjustice attorney David Henkin pointed out, "Before it was an irrigation system, it was a river."

In July 2013, Earthjustice, on behalf of Po'ai Wai Ola/West Kauai Watershed Alliance, filed the petition with the Water Commission seeking to end what the organization's members saw as the waste of diverted stream flows by the ADC and its tenants and to amend the interim instream flow standards for the Waimea River and its tributaries, which feed the Koke'e Ditch and Pu'u Lua reservoir.

Henkin argued that before the Land Board made any decision to provide water to hydro plants, it needs to know what the public trust is.

"The board has simply no information right now to make that assessment," he said.

He added that even though the KIUC project would be a closed-loop system, it will require "make-up water" from the ditch as a result of evaporation and system losses.

The courts have ruled that when deciding on a water lease, the Land Board could either choose to make determinations on its own about how to protect the public trust, or wait until the Water Commission decides the same and independently review its findings, Henkin said.

"You can go it alone or you can wait for CWRM to make a decision and effectively tie the two [cases] together. Everyone should have a common interest in resolving that as quickly as possible," he said.

As of press time, the Water Commission's appointed investigator of the waste complaint had not fully inspected the irrigation system or taken flow measurements in both dry and wet seasons, according to Henkin.

Rebuttal

Given the strong push for a deferral from the potential developers of two hydro projects, Bissell said he was concerned that there was a "co-mingling of issues today."

KIUC's pumped storage hydro project differs from the DHHL's and Konokihi's proposed run-of-the ditch hydro projects where water simply flows in one direction through a facility, he said.

"Our project is essentially filling a water bucket, one time. It's not taking water away from DHHL [or] agriculture," he said. "I think it's very important we keep that straight."

According to Joule's Jason Hines, once that "bucket" is filled, the project wouldn't require any more water, except for about 100,000 gallons of make-up water.

As to whether the utility would consider supporting those other projects, they would have to make sense, Bissell said.

He said the utility needed an agreement-in-principle because it will take years to develop the project and with all the conflicting interests, the co-op has a fiduciary duty to "have some assurance we're in line on this."

He added that he knows the project may fail for various reasons and there are a ton of studies that need to be done before KIUC knows whether its project is feasible.

With regard to Konohiki's project, Bissell said that although KIUC has so far rejected a PPA based on the project's merits, "they can come back. [If they] make a compelling project that works for us … we'll sign it."

He added that KIUC would be happy to work with the DHHL, but that it wants to support only the best projects.

"The projects have to stand on their own. … This [approval] doesn't stop those projects. The merits of those projects stop those projects," he said.

Finally, Bissell argued that KIUC's project would, indeed, help agriculture in the area because it would install a pipeline in the Mana plain.

KIUC board member Jan TenBruggencate added that the project pays to repair the reservoir and "once it's repaired, that's pure benefit to the folks downstream."

Meheula did not seem comforted by Bissell's comments.

"There is clearly a competitive problem," Meheula said.

Yuen conceded that there is competition of who would get a power contract, but not who would get the water.

"DHHL has rights to water. Not to a power contract," he said.

Even so, Meheula argued that if the Land Board gave KIUC the assurances it sought, "you're going to be giving a nod, assurance, and comfort that is going to prohibit DHHL from doing a project, prohibit DHHL from homesteading."

Approved as Amended

After the Land Board held an executive session to discuss some of the legal issues the DHHL had raised, Yuen made a motion to approve the Land Division's recommendations, except for the proposed lease for water. That matter would be deferred until the Land Board fulfilled its requirements under HRS Chapter 171-58, he said.

"I would like to emphasize approval-in-principle allows the applicant to go forward with various studies and does not in any way commit the board to an action," he said.

The board unanimously approved Yuen's motion. ***— Teresa Dawson***

BOARD TALK

Board Again Delays Enforcement Of Illegal Shoreline Construction

At its November meeting, the state Board of Land and Natural Resources deferred for the second time acting on a proposed $31,000 fine against Grand View Apt., Inc., which owns a shoreline parcel in Mokuleia, O'ahu, that was devastated by winter swells about a year ago.

With the high surf having already undermined a seawall and with waves then scooping away sand from his yards, Grand View principal Dean Hanzawa dumped and cemented large rocks makai of his two properties and also hardened a city right-of-way that bisects them. The revetment, he said, was mainly intended to protect the public from his failing seawall, the face of which had broken away and leaned about 45 degrees toward the beach.

Although Hanzawa had called the City and County of Honolulu and the state Department of Land and Natural Resources for help, the work was ultimately done without the necessary authorization from the Land Board.

In April, the DLNR's Office of Conservation and Coastal Lands recommended fining Grand View the maximum fine of $15,000 for unauthorized reconstruction of the company's erosion control structures, $15,000 for unauthorized construction in the city's right-of-way, and $1,000 in administrative costs.

At the Land Board's April 25 meeting, Grand View representatives asked for and received a deferral to allow time for a survey to be done to delineate the extent to which the unauthorized work encroached into the Conservation District.

At the Land Board's meeting last month, the OCCL again recommended the same fines. Grand View had prepared a survey of the area, based on a presentation by its consultant (and former DLNR director) Peter Young, but the survey failed to provide the information the Land Board had asked for in April.

The survey did not show where the original seawall had been on one of Grand View's properties. According to Young, the original wall was somewhere buried inside the boulder revetment.

Grand View's attorney had requested that the Land Board either allow the unauthorized uses to remain or to defer the matter so the city could be brought into the matter, said OCCL administrator Sam Lemmo.

Grand View's position is that the erosion on its properties would not have been so severe had the city not condemned a 10-foot wide right-of-way between the two lots and then failed to fortify it. The path created a weak spot that allowed water to undermine the adjacent properties, the company contends.

Lemmo admitted that the right-of-way may have played a part in what happened, but he had a problem with the unilateral action taken by Grand View and the fact that the company built further out than what originally was there. Because the work encroached on unencumbered state land, Lemmo said he was forced to recommend an enforcement action.

In addition to the fines, the OCCL recommended that the illegal work be removed.

Young argued that if the Land Board orders the structures removed, "you're condemning houses that were otherwise protected."

He added that in a case where a neighboring property sought and received an easement for an erosion control structure, the OCCL stated that removing it "may destabilize seawalls and lawns on adjacent properties.

Grand View wanted a chance to obtain after-the-fact permits and an easement for the work that was done, and to coordinate with the city and DLNR on a way to keep the public access from eroding, Young said.

Howard Hanzawa, Dean's brother and an engineer, said he designed the revetment on the south parcel 14 to 15 years ago and the other seawall had been there since the mid-1970s.

"I have no doubt in my mind if the City and County right-of-way was properly reinforced, we would have had no problem," he said.

When asked about the recommendation to remove the portion of the structure within the Conservation District, Lemmo said that first, he still wanted a survey that shows where the original seawall was.

"I haven't seen that survey. We asked them to survey the area of the original wall. Anything outside, that's what we would want them to remove. The idea was they would redevelop the structure," he said.

He explained that the Land Board has never in recent memory allowed anyone who illegally installed rocks on the beach to keep them there. All of the easements that have been issued for erosion control structures that encroached onto state property were for ones built in the 1960s and 1970s "and for some reason they became on state land," he said, adding that the DLNR still required some of the owners to remove parts of the encroachment.

Although he admitted that everything Grand View's representatives were saying about the county right-of-way had merit, he was just trying to be consistent with past enforcement, he said.

Dean Hanzawa said redesigning the structure at this point would be very expensive and he's already financially exhausted, having spent nearly $200,000 on what was done.

Lemmo agreed that it would be expensive, but said it's physically doable.

"You can't sit there and say you can't do it. I've been here 20 years and seen people engineer things much tighter. If you're asking us to walk away from this and let it go, I can't support this. If you're asking us to do an after-the-fact easement, you're sending them down the road that is going to be so expensive. They're going to have to write an [environmental assessment], request an easement for the area. There's substantial costs and time involved in the after-the-fact process. If they

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just summarily agree to remove the areas that were illicitly put in the Conservation area, they don't have to talk to us again," he said.

Despite Lemmo's argument, Land Board member Vernon Char wanted to see whether a solution that involved the city could be achieved. He made a motion to defer until the Land Board's first meeting in April.

Before the board could vote, residents of the area upset that their public access has been taken away, urged the Land Board to approve the OCCL's recommendation so Grand View had an incentive to fix the problem.

One resident, Kelly LaPorte, alleged that Grand View was telling only part of the story. He said the work started in the middle of 2013 and heavy equipment was being moved through the right-of-way.

"In December, after they did construction over the summer … I just gotta think that accelerated the erosion," he said, adding, "I don't know what the solution is. Deferring it and deferring it means the public doesn't have access to public beaches. That's now a private beach, not a public beach."

Before the Land Board voted, Lemmo argued one last time against deferral.

"Do I feel like you're making the correct motion? No. The way to draw the city in is to follow through with the action. They will ask for a contested case," Lemmo said. A contested case would allow the city to formally intervene.

What's more, the board could still find that there had been a violation even though a solution has not yet been worked out, he continued.

In the end, the Land Board unanimously voted to defer the matter so yet another survey could be done and possible solutions prepared.

⚘⚘⚘

Malaekahana State Park Gets New Manager

For the first time in some 20 years, Malaekahana State Recreation Area will have a new operator. On November 14, the Land Board approved a five-year lease to Malaekahana Beach Campground, LLC, which plans to manage and improve the 36-acre park.

A state evaluation committee had determined that Lanihuli Community Development Corporation, which has run the park for the last two decades and whose permit ends December 31, did not qualify to submit a request for proposals to the DLNR's Division of State Parks for the short-term lease.

Lanihuli's president Craig Chapman admitted, "Basically, I'm a lame duck and I'm out of Dodge." But he was clearly angry at how things were ending.

"I want to get something clear: I don't want what happened to me to happen to Ray," he said, referring to Malaekahana Beach Campground's CEO Ray Sanborn.

"During the time I've been there, not a dime has been spent [by the DLNR] on Malaekahana and I've been on a month-to-month permit," Chapman said. In the past, Chapman has complained that such short-term tenure made it difficult for him to get adequate financing for improvements. He added that he thought the dangerous trees at the park should be trimmed.

"I don't want Ray to … take on the liability of an unsafe park," he said, noting that some trees are 80 feet tall.

"A gal almost got killed on October 13. The whole root came out. … You've got another Sacred Falls in the making," he said. The DLNR closed access to Sacred Falls years ago after a rock slide killed several people.

Champan also complained about State Parks' request for qualification process. He called it flawed at best, noting that to qualify, an applicant had to be able to pay $2,000 a month plus 7 percent of gross revenues. The request for proposals then changed the proposed rent to $2,000 a month or 7 percent of revenues.

"That's a $2,000 a month swing," Chapman said. "We had $6 million ready to go. I had 20 years of experience."

He finished by suggesting that the evaluation process was also flawed.

"It's very, very difficult going into an evaluation commission when you know you have biased individuals. … I know park staff said, 'I hate that guy and I want them out. One of the people on the neighborhood board said, 'We got 'em,'" Chapman said.

(In 2012, State Parks had, indeed, tried to oust Lanihuli for, among other things, allegedly conducting unauthorized grading, construction and landscaping. Parks administrator Dan Quinn said at the time that management at Malaekahana was a mess. For more on this, read our March 2012 Board Talk.)

Jim Anthony, a member of the public, testified that when he asked State Parks for any correspondence that had been circulated about the Malaekahana lease, he was told he would have to pay $,2600 to get the documents. Anthony speculated that they contained back-channel discussions, including with Land Board chair and DLNR director William Aila, about ways to oust Chapman

Anthony asked that the Land Board defer approving the lease so the matter could be discussed further. He added that there was a chance of litigation.

"If you wanna do a litigation, you do a litigation. If you want me to make a decision in this, I'm not going to make a decision on small information. I don't think this is the proper forum for that, " Hawai'i Land Board member Stanley Roehrig told Anthony. Chapman had left the meeting immediately after speaking.

"It's a heavy allegation to say the chairman … is involved in any kind of hanky panky," Roehrig said. "My own instincts are, I don't wanna go too far down this road."

The Land Board ultimately voted to approve the lease, but directed staff to find a way to give Chapman the time and ability to remove his property from the park.

Anthony then requested a contested case hearing. — ***T.D.***