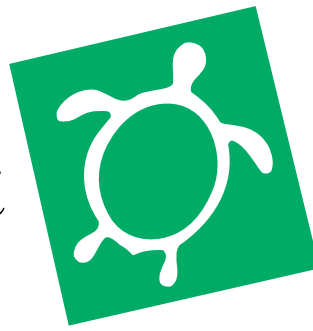


# Environment



# Hawai'i

a monthly newsletter

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## Going with the Flows

The dewatering of dozens of Maui streams has left their beds dry and taro lo'i parched, while the cane fields of the central plains are lush and verdant. In recent years, though, the state Commission on Water Resource Management has been petitioned to restore water to them, in hopes of allowing native stream fauna to flourish and the cultivation of taro to burgeon.

The approach the commission has taken to these petitions has been inconsistent, to put it charitably. As a result, the disputes are now before the Hawai'i Supreme Court.

With this edition, *Environment Hawai'i* embarks on its 23<sup>rd</sup> year of shedding light on the state's most challenging, troubling environmental problems. We hope you'll support our ongoing efforts with a donation, a subscription for a friend, or by joining us at our August 24 fundraiser. For details, see page 4.

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## Supreme Court Weighs Jurisdiction In Appeal of Decision on Maui Water

On June 6, every seat in the ornate second-floor courtroom of Ali'iolani Hale was taken well before the 9 a.m. start of oral arguments before the justices of the Hawai'i Supreme Court. Stragglers were forced to stand.

That day, parties in one of the biggest fights over water in state history argued over whether and, if so, how the state Commission on Water Resource Management erred in its 2010 decision on a petition to amend the interim instream flow standards (IIFS) of four West Maui streams, collectively known as Na Wai 'Eha.

Perhaps more important to observers than the critique of the commission's decision was the discussion of whether or not the court even had jurisdiction over the case. The court's answer to that question is likely to clarify how decisions regarding water must accommodate constitutional protections of Native Hawaiian traditional and customary practices.

The court's decision in the Na Wai 'Eha case will almost surely make or break a similar appeal of interim instream flow standards set for 19 streams in East Maui.

The cases were initiated by Native Hawaiians, kuleana landowners, and environmentalists who have long wanted waters — diverted for more than a century by commercial users — to be restored to their streams of origin. Combined, the cases involve hundreds of millions of gallons a day of diverted stream water, several hundred sugar plantation jobs, and an unknown number of people

with constitutionally protected rights to use that water. In short, the future of Maui is at stake.

### Waiahole's Impact

Justice Simeon Acoba went straight to the point with his first question to Isaac Moriwake, the Earthjustice attorney representing appellants Hui O Na Wai 'Eha and the Maui Tomorrow Foundation: How does

the Hawai'i Supreme Court have jurisdiction over the Water Commission's decisions on IIFS?

In this case, the commission decided in 2010 to set IIFS that partially restored flows in Wai'ehu Stream and Wailuku River, but restored none to Waikapu and 'Iao streams in

West Maui. The result: instead of diverting an average of 67 million gallons of water a day (mgd), Wailuku Water Company (WWC) and Hawaiian Commercial & Sugar were limited to about 54 mgd.

To Moriwake, the answer to Acoba's question is in the court's 2000 decision regarding waters diverted by the Waiahole Ditch from Windward to Central O'ahu. A footnote in the order states that while statutes and rules don't require a contested case hearing on petitions to amend IIFS, constitutional due process mandates one because of the individual instream and offstream rights, duties, and privileges at stake. And according to Hawai'i Revised Statutes, if a contested case hearing is required by law, it is also appealable in court.

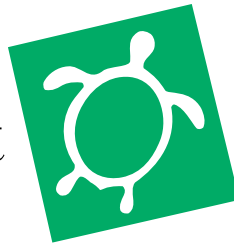
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Dry 'Iao streambed.

PHOTO: EARTHJUSTICE

# Environment



# Hawai'i

Volume 23, No. 1

July 2012

## NEW AND NOTEWORTHY

**Soaring Success:** Numbers of fledged Laysan albatross and wedge-tailed shearwater chicks at O'ahu's Ka'ena Point Natural Area Reserve reached record highs in recent months, with 31 albatross and 1,700 shearwater chicks.

A 600-meter fence has protected the reserve from cats, dogs, and rodents for more than a year. Whether or not the fence alone is responsible for the record numbers (it could have simply been a bumper year, some say), it's clear the reserve has been sustaining, and attracting, more seabirds recently.

Marigold Zoll, section manager for the O'ahu NARs, reported last month that two rare black-footed albatross visited the reserve recently, as well as a brown booby. The latter is "a first," she told the NARS Commission at its June 4 meeting.

The Hawai'i booby population (estimated at 1,400 breeding pairs) breeds almost exclusively in the Northwestern Hawaiian Islands



A brown booby at French Frigate Shoals in the Northwestern Hawaiian Islands

PHOTO: PUBLIC DOMAIN PHOTOS

and on offshore islets in the Main Hawaiian Islands, although it may breed on cliffs at the Kane'ohe Bay Marine Corps Base in windward O'ahu.

The black-footed albatross breeds on all islands in the NWHI, but there is no evidence they historically bred in the Main Hawaiian Islands.

**Deer Battle Heats Up:** The battle over axis deer on the Big Island has been growing more heated in recent weeks. Palikapu Dedman, a leader of the Pele Defense Fund and well

known for his stand against geothermal energy two decades ago, has come out opposed to any effort to eradicate the deer on Hawai'i Island, to which the deer were recently introduced.

In an open letter "to hunters and gatherers" written in May, Dedman was soliciting funds that "will go to the immediate use for a retainer or down payment to the attorney that will file a class action law suit to stop immediate fencing and eradication of deer, sheep, goats, pigs and cattle on DLNR lands including NARS areas."

Claiming that "traditional and customary practices [have been] grossly neglected in the designated fence lands to date," Dedman goes on to say that the funds will be kept "in a litigation account with PDF and only used as such."

(The tax-exempt status of the Pele Defense Fund was revoked last year by the Internal Revenue Service after three years of non-filing of required financial reports.)

Meanwhile, Dominic Yagong, County Council chair and candidate for mayor, introduced a bill calling on the Department of Land and Natural Resources to end all aerial hunting of feral ungulates. The measure passed first and second readings unanimously and at press time was on the desk of Mayor Billy Kenoi. Yagong also introduced a charter amendment establishing a Game Management Advisory Commission to advise agencies on matters relating to subsistence hunting and fishing and the protection of traditional gathering rights. That, too, passed without dissent and will probably come before voters in November.

**Corrections:** In our June cover story, we erroneously reported that Larry Nakayama had left the Hawai'i County Planning Department. He is still with the department. The employee who left was his supervisor, Garrett Smith.

Also, sharp-eyed readers may have noticed that the cover of our June edition identified it as the May edition. That, too, is an error.

We are very sorry for both of them.

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### Quote of the Month

*"Are you saying Native Hawaiians  
don't have any water rights?"*

— *Hawai'i Supreme Court  
Justice Sabrina McKenna  
to a state attorney*

## Manager Suggests Various Changes To Improve Feed-in-Tariff Program

The state's feed-in-tariff (FIT) program is simply experiencing growing pains.

That's the opinion of Harry Judd, the independent observer (IO) appointed by the state Public Utilities Commission to oversee the FIT program, launched in 2010 to facilitate the interconnection of renewable energy projects to grids controlled by the Hawaiian Electric companies.

In response to complaints about the status of applications and apparent lack of movement in the FIT queue, Judd submitted a status report to the PUC on May 23 detailing what he believed were the problems and possible solutions. His report expands on a motion for clarification regarding program administration, filed by HECO on May 4 to address many of the same queue management issues.

Rather than having to negotiate with utilities for a power purchase agreement, qualified FIT projects are guaranteed interconnection and standard rates for 20 years. Late last year, the program approached its 80 megawatt capacity, set by the PUC, leaving projects totaling more than 100 MW in the reserve queue.

The resulting competition among developers to maximize the number and size of projects that can be installed has led to complaints of parties "gaming" the FIT application process, among other things.

"Some applicants expressed concern that the queues appeared to be populated with multiple applications from a limited number of applicants, and that there appeared to be little effort by Hawaiian Electric Company or the IO to police the queues," Judd wrote.

And in his review, Judd found they had reason for concern:

Some FIT applications for mid-sized projects were submitted without meeting

the prerequisite of having submitted a building permit application to the county. Others reserved queue capacity with unrealistic development time frames, then demanded 180-day extensions (the maximum).

"Too many applications have gotten a queue position and then fail to be developed," he wrote. Of the 76.5 MW of projects in the active queue, less than 5 MW had actually been installed as of press time.

Once a project meets all of the prerequisites — controlling a site, applying for a building permit, paying the required fees — the FIT program has no mechanism to track whether a project is being constructed, Judd wrote. As a result, an idle project can sit in the active queue until its allotted development period expires, which can be up to a year and a half in most cases.

In other cases, delays by HECO in determining whether or not a project required an interconnection requirements study (IRS) have kept some projects from moving forward.

"In some cases, applications have lingered for months without the initial determination of whether an IRS is needed, which is both contrary to the requirements of the Tariff and a frustration of the intended goals of the FIT program," he wrote, adding that "too many applicants complained of slow responses by the HECO Customer Installation Service (CIS) personnel, after completion of projects."

Judd also expressed his frustration with some of HECO's efforts to help FIT applicants work around program requirements.

"It is apparent that neither HECO personnel nor developers fully embrace the concept of a Tariff program," he wrote.

Judd described how HECO, in trying to accommodate the needs of applicants, had

sought ways to allow the utilities to reach their development goals, even if they are inconsistent with FIT program requirements. In addition, applicants have misrepresented facts, attempted to change the size and completion dates of their projects after acceptance into the program, and submitted multiple projects for a single tax map key without permission, among other things.

At least one applicant, unhappy with program requirements, "attempted to acquire political influence and use threats to further a desired goal," he wrote.

"It is understandable that individuals more accustomed to the traditional PPA [power purchase agreement] process, where negotiation of terms is the norm, would default to a familiar behavior. However, one goal of the FIT program is to be 'plug and play': either a project qualifies and is 'shovel-ready' or it is not," he wrote.

### Proposed Solutions

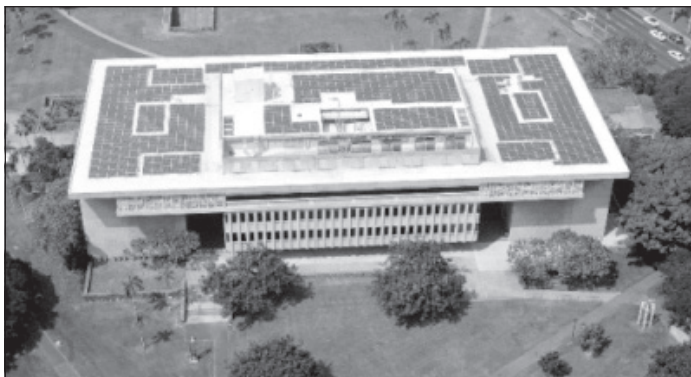
To address some of these problems, HECO proposed creating a single queue in which current FIT applicants were ranked by the time and date of their applications (rather than a mix of application dates and completion dates), and giving applicants who had not properly applied for a building permit a short grace period to do so. In general, HECO sought clarification from the PUC regarding the discretion its companies and the IO have "with regard to ensuring that only viable projects that meet program requirements are allowed to remain in the queue."

With regard to building permits, Judd recommended simply removing projects that had not applied for one from the queue. Among other things, he also recommended the following:

- Use the FIT website for communications and delivery of documents.
- Outsource IRS determinations.
- Set completion milestones for FIT projects and remove projects that fail to meet them.
- Assign a HECO account representative and an alternate to respond to applicant requests for CIS.

Response to the recommendations has been mixed. Blue Planet Foundation supports the use of the FIT website to avoid bilateral discussions and accommodations with HECO. The Hawai'i Solar Energy Association agreed with the recommendation to consolidate the current FIT queue. However, it opposed setting milestones in this round, as well as the outsourcing of IRS determinations.

"[O]nly the HECO companies possess the full circuit data and modeling capability



The 1,005 photovoltaic panels on the state's Kalanimoku Building in downtown Honolulu generate a minimum of 296,849 kilowatt-hours of electricity. Under the Hawai'i Clean Energy Initiative, the state plans to produce 70 percent of its energy needs with clean sources by the year 2030

PHOTO: DBEDT





necessary to perform this determination,” association attorneys wrote in their June 12 filing with the PUC.

Whether the PUC adopts any of the IO's or HECO's recommendations, or those raised by other FIT docket parties in response, remains to be seen. The commission plans its first re-examination of the FIT program this fall.



## Another Status Update: Reliability Standards Working Group

In its report to the PUC, FIT program manager Harry Judd was clearly struggling with managing the more than 300 applicants seeking to develop renewable energy projects on O'ahu, Hawai'i, and in Maui County. Between trying to keep the queue populated only with diligent and qualified applicants, and ensuring that the Hawaiian Electric companies are helping rather than hurting the process, he has his hands full.

But he is not alone.

An offshoot of the PUC's FIT docket — the Reliability Standards Working Group — has experienced some growing pains of its own, according to a June 1 report to the PUC by Alison Silverstein, the group's independent facilitator.

On May 4, the PUC ordered Silverstein to submit a status report on the group's progress toward reaching its goal of recommending standards, to help determine how the state can interconnect the maximum amount of renewable energy to the grid while preserving grid reliability.

Silverstein admits that the group got off to a “rocky start,” but says it has been working diligently in the past few months to reach its goals. The group held its first meeting last July and has met five times in person since then, meeting last on May 22.

In that time, the group has created seven subgroups and developed work plans for them (as well as for the group as a whole), and received several informational briefings.

The group's Minimum Load and Curtailment subgroup designed two analyses of the Hawai'i Electric Light Company's 2011 operations and wind curtailments, which were carried out by PUC consultant Brendan Kirby. The subgroup is working to do a similar study of Maui Electric Company's grid operations.

It also prepared a scope of work for a study on ancillary services, which will be

done by a Hawai'i Natural Energy Institute contractor, and created a glossary of terms.

The group is expected to complete its work by the end of the year and the PUC has asked it to develop a list of recommended reliability issues and/or related studies, if any, that would best be addressed in the PUC's Integrated Resources Planning docket opened on March 1, 2012. It has also encouraged the group to evaluate and make recommendations on any technical issues that would inform the commission's FIT re-examination.

While Silverstein assured the commission in her report that the RSWG has recently been working “with talent, conviction, enthusiasm and good will” to complete its projects, the state Division of Consumer Advocacy executive director Jeffrey Ono seemed to think more was needed. In a June 4 filing, he suggested that the PUC might want to identify deliverables that it would like to have from the RSWG.

If the intent of the RSWG process was to identify steps and establish measures to facilitate renewable energy development, the PUC might want to analyze the overall process and subgroup objectives to determine whether the process will meet the commission's needs, he wrote.

“Without this review, it is not clear that the RSWG process will provide timely meaningful analyses regarding potential technical solutions and, at some later point, the

## For Further Reading

*Environment Hawai'i* has published several articles (available at [www.environment-hawaii.org](http://www.environment-hawaii.org)) that will provide additional background on the FIT program and Reliability Standards Working Group:

- “Renewable Energy Projects Trickle In with Launch of Feed-in-Tariff Program,” December 2010;
- “Utilities Propose Stricter Standards for Distributed Generation Facilities,” January 2011;
- “New & Noteworthy: Powerful People,” July 2011;
- “Group Meets to Resolve Impasse over Renewables,” October 2011;
- “Renewable Energy Projects Languish as Feed-in-Tariff Program Maxes Out,” April 2012.

cost impact for each solution and the time necessary to implement each solution for the commission to use in its decision-making process. While significant efforts and lengthy discussions have occurred, the progress in terms of providing the commission the wherewithal to make decisions on critical reliability measures is not entirely clear,” he wrote. — *T.D.*

## Save the Date! August 24th

That's when *Environment Hawai'i* is throwing a party to celebrate the start of our 23<sup>rd</sup> year of providing the state with hard-hitting, investigative environmental reporting.

**Music** Of course. Jazz Brothers John Parker (bass) and Tom Sawicki (guitar) will be joined by vocalist Valerie Simpson to entertain you as the evening begins.

**Food** Check. The groaning buffet tables will be catered by the 'Imiloa Astronomy Center dining room.

## Intelligent Conversation

Jon Price of the University of Hawai'i-Hilo will speak on the critical importance of watersheds: “Why we are Waiwai: A Biocultural Watershed Moment.”

**Art** Some of the Big Island's finest artists and crafts people have donated their work to be sold at silent auction.

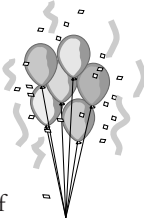
Cost is \$60 per person, which includes a \$20 donation. Seating is limited; reserve your place now. Or get together with friends and book a table for eight (\$480).



Space in our program is also available, and we are still accepting silent auction donations.

Call 877 934-0130 or email us at [ptummons@gmail.com](mailto:ptummons@gmail.com) to make reservations or for more information.

**See you there!**



## Biofuels Consortium Courts Agency For Agricultural Land on Kaua'i

Yet another renewable energy company has clamped its eyes on Kaua'i lands controlled by the state Agribusiness Development Corporation.

Hawai'i BioEnergy, which seeks to develop, produce and sell biofuels in Hawai'i, announced to the ADC board in May that it is looking for Kaua'i land on which it can grow feedstock, although it is seeking no specific amount from the ADC's inventory of land at this time.

Preliminary estimates suggest that the company will require at least 3,000 acres on Kaua'i, whether from the ADC or somewhere else.

Hawai'i BioEnergy is a partnership that includes three of the state's largest landowners (Kamehameha Schools, Maui Land & Pine, and Grove Farm), tech firms Khosla Ventures and Finistere Ventures, and eBay and *Honolulu Civil Beat* co-founder Pierre Omidyar's venture capital firm, 'Ohana Holdings.

The company's recent experiments on Kaua'i and O'ahu converting crops into oil and fuel have proven successful enough that it wants to scale up, said Joel Matsunaga, Hawai'i BioEnergy's chief operating officer.

"All of our modeling shows you won't make money if you only sell biofuel. You have to sell co-crops," using whatever technology fits the site, he said. "We have to have all parts of the equation under control ... rather than [having] a conversion site and assuming someone will sell you bio-feedstocks."

Hawai'i BioEnergy already has a firm buyer in Hawaiian Electric Company. Last August, Hawai'i BioEnergy signed a contract with HECO to supply the utility with 10 million gallons a year of locally grown biofuels for 20 years. Matsunaga said he expects the state Public Utilities Commission to approve the contract by year's end. The company would then have five years to start delivering the full amount to HECO.

In addition, Hawai'i BioEnergy wants to provide biofuel for military and transportation needs and plans to use conversion facilities that must process 400 tons of dry feedstock a day to be economical. To do that, it needs a lot of land.

The company, which sees trees as its primary crop, already has a large chunk of potential feedstock land locked up on Kaua'i: 14,000 acres owned by Grove Farm. (With stream setbacks to prevent erosion taken into account, the usable land is closer to 10,000 acres, Matsunaga says.) It also has a letter of intent from Kamehameha Schools for 12,000 acres on the Big Island and is seeking more land from

Parker Ranch.

With regard to public lands, Hawai'i BioEnergy is looking at ADC's lands on Kaua'i, the Department of Land and Natural Resources' Waiakea forest lands on the Big Island, and other state parcels, Matsunaga said.

"We would like a long-term license for 20 years and beyond. We would like as much land as available," Matsunaga told the board, adding that it could pay higher rents than the ADC's existing tenants and also that it has forest management expertise.

"We're looking at trees. On flatter lands, we'd use grasses maybe. The land doesn't get touched as much. Ultimately, we think the land is treated a lot better and it helps the state reach its Hawai'i Clean Energy Initiative commitments. HECO and KIUC [Kaua'i Island Utility Cooperative] have targets to reach. We can help," he said.

Board member Duane Lau asked whether Hawai'i BioEnergy's Kaua'i project could proceed without ADC lands.

"Yes and no," Matsunaga said. "Weyerhaeuser [a partner] will tell us if we have enough material coming from the land for that one conversion unit. If we don't do enough for 400 tons a day, we could just go with the Big Island. If we can't get ADC land, we would try to find other lands."

When asked by board member and DLNR water deputy William Tam how many acres the company needs to produce 400 tons per day, Matsunaga said it needs to produce 130,000 to 135,000 tons a year. With 10,000 farmable acres from Grove Farm and using a rate of 10 tons/acre/day, it could produce 100,000 tons a year right now, Matsunaga said.

"[We] still need 30,000 to 35,000 tons," he said, which equates to 3,000 to 3,500 acres.



### Is Pac West Fading Or Ready to Rock?

Had everything gone as planned for Pacific West Energy Kauai, LLC, its proposed 20 megawatt power plant would have begun commercial operation this month, with biofuel production soon to follow.

Once ranked number 37 on the state energy office's list of 40 important renewable energy projects, it's now unclear exactly what the company proposes to do: It hasn't decided where its plant will be, has no firm agreements for feedstock land, and doesn't yet know

whether it wants to produce power and biofuel, or just biofuel.

Even so, the company pressed the ADC board at its May meeting to grant it a lease of some 750 acres in Kekaha, Kaua'i, before the end of the year.

The company proposed as early as 2006 to produce energy and biofuels using former sugarcane land and had agreed to provide the island's utility, KIUC, with 20 to 25 MW of power. But with Pac West's continual shifting of plant and feedstock sites, KIUC eventually walked away.

As a result, Pac West has downscaled its project to produce only 5 to 12 MW (Phase 1) and biofuels (Phase 2).

"We submitted detailed financials to the utility explaining that we can still do this," company manager William Maloney told the ADC board. Phase 1 would cost \$25-30 million; Phase 2, \$60 million.

"We may not even do Phase 1. Personally, my inclination is do Phase 2, but we have investors who want to do Phase 1," said Maloney.

Last September, Maloney told *Honolulu Civil Beat* reporter Sophie Cocke that biofuel conversion technology was not ready for commercialization and called Hawaiian Electric Company's request for proposals to produce biofuels — which Hawai'i BioEnergy won — a "fantasy RFP." But by the ADC's May meeting, he had clearly revised his opinion about the feasibility of conversion technology.

"The technology caught up with us. That was going to be a later phase," he said. "The delay [in getting the project off the ground] has resulted in a more opportune environment for the project."

Pac West no longer needs to sell electricity to KIUC and also doesn't need its help with financing, he added.

"With the project now, we don't need debt financing. KIUC, they've gone from guaranteeing our loans, then there's a change in management, and they're not guaranteeing our loans," he said.

Pac West is expected to decide by August 1 whether to proceed with Phase 1. With Phase 1, Pac West needs at least 5,250 acres; without it, only 3,750. Either way, ADC's land is critical, Maloney said.

Also this summer, the company is developing a memorandum of understanding with Rentech, which will provide biofuel conversion equipment and equity and will eventually be the project's owner, Maloney said. (Rentech holds an interest in ClearFuels Technology, Inc., which has developed a biomass gasifier that can turn a variety of feedstock types — wood waste, bagasse, etc. — into diesel and jet fuel. Together they are developing biomass-to-

## Supreme Court Dissects Arguments In Appeal of Maui Stream Standards

Appellants in the Na Wai 'Eha case have a laundry list of gripes about the Commission on Water Resource Management's June 2010 vote setting interim instream flow standards (IIFS) for four West Maui streams.

To start, the commission erroneously used flow levels proposed by the U.S. Geological Survey for a habitat study as a basis for its decision to restore 12.5 million gallons of water a day to Waiehu Stream and Wailuku River and nothing to 'Iao and Waikapu streams, they argue.

Although the USGS had proposed additional flows to 'Iao and suggested that flows could be restored to Waikapu in a future study, CWRM cited 'Iao's 20-foot concrete drop and the remote likelihood that Waikapu ever reached the sea as reasons why restoration would do little, if anything, to improve habitat for amphidromous stream organisms such as native gobies and limpets.

During oral arguments on June 6 before the Hawai'i Supreme Court, attorneys representing Hui O Na Wai 'Eha, the Maui Tomorrow Foundation, and the Office of Hawaiian Affairs detailed the areas in which the commission faltered.

Attorneys representing CWRM and Hawaiian Commercial & Sugar (HC&S), meanwhile, argued why they believe the commission's decision should stand.

### Well 7

One of the commission's most egregious errors in the appellants' eyes is its drastic underesti-

mation of the amount of water available from HC&S's most practicable alternative to Na Wai 'Eha water, Well No. 7. HC&S historically pumped 21 mgd from the well. The Water Commission, in its balancing of instream and offstream uses, decided that HC&S could reasonably take no more than 9.5 mgd from Well 7.

The commission did not explain in detail how it arrived at 9.5 mgd, but did cite uncertainty about the capacity of the well and impacts of overpumping of the aquifer.

"This is the most productive well in the state. ... If this is not a practicable alternative, I don't know what is. HC&S has always used this source," said Earthjustice attorney Isaac Moriwake, who represents the Hui and Maui Tomorrow Foundation.

"You don't think there would be a problem with [aquifer] recharge" if more was pumped from Well 7, Justice Paula Nakayama asked.

"Not based on the record," Moriwake said. "HC&S has insisted it's used all its wells without impact on quality. ... CWRM plucked 9.5 [mgd] out of the sky."

Former water commissioner Lawrence Miike, who was the contested case hearing officer and had opposed the commission's final IIFS decision, made a similar claim in his dissent.

"Regarding pumping [only] 9.5 mgd [from Well 7], he said that decision was without any credible foundation," Nakayama noted during her questioning of deputy attorney general Julie China, who represented CWRM.

What was the foundation for that number?

China deferred to HC&S attorney David Schulmeister, but did say the decision was based on aquifer recharge concerns. She also noted that the electricity cost to pump the well was significant.

When it came time to question Schulmeister, Justice Simeon Acoba first asked him if he agreed that the Hawai'i Supreme Court's 2000 ruling in the Waiahole Ditch case found that offstream commercial uses are subject to a higher level of scrutiny.

With regard to the various justifications HC&S and the state had presented for minimizing the use of Well 7, Acoba asked, "You didn't produce the records that would have established in fact an increase in salinity? Is that true? If it is, did the commission ignore that the records were not produced?"

Schulmeister replied that HC&S's Rick Volner admitted during the contested case hearing that the company maintained salinity records, but they weren't introduced as evidence.

Acoba noted that another of the commission's justifications for minimizing the use of Well 7 was that HC&S was simply using it less.

"The opposing party [the Hui and Maui Tomorrow] showed it was because it was more profitable because of rising oil prices," Acoba said.

"There's no question HC&S is at a break-even point," Schulmeister said.

Acoba pressed the issue: "Well 7 could have pumped out more but it was pumped less to raise profits for the company? What did the commission do with those facts in applying a higher level of scrutiny?"

The commission required HC&S to remedy a seepage loss of 6 to 8 mgd, and "definitely put

energy projects in Hawai'i.)

"I need to be planting land before the end of the year," he said. "What do I need to do" to get it, he asked the board.

### No Direction

When it came time to discuss what to do about Pac West, neither staff nor the ADC's board were sure how to proceed.

Noting that no one had any handouts on the Pac West agenda item, board member and state Department of Business, Economic Development and Tourism deputy director Mary Alice Evans asked ADC executive director James Nakatani whether he had an assessment of the company's proposal and recommendation for the board.

Nakatani seemed to want the board to give him direction.

"We just don't want to sit on the land. ... We don't have anybody in mind. They have a proposal, that's fine, but I want everybody to step it up," he said. "I've been sitting on this waiting for a proposal."

Renewable energy company Pacific Light and Power, which won a lease last year for much of the same lands Pac West had been eyeing, also wants the 750 acres.

Given Hawai'i BioEnergy's recent interest in the land, "we should get a proposal from all three of them," board member David Rietow suggested.

Board member and new state Department of Agriculture deputy director Scott Enright agreed. He said that while Maloney had made an interesting presentation, his company had exhibited "a real failure to perform."

Maloney countered that his company

had twice submitted documentation to ADC staff to support its request for land.

"We never received a draft lease to conclude the transaction," he said.

To this, Marissa Sandblom reminded Maloney that Pac West's project constantly changed. "Milestones kept getting pushed out further and further. [You] never got a power purchase agreement with KIUC, which was integral," she said. (Although Sandblom is vice-president of Hawai'i BioEnergy partner Grove Farm, she did not recuse herself from the discussion.)

In the end, none of the board members was comfortable deciding one way or another on Pac West's proposal without a recommendation from staff, but they suggested that Nakatani draft a general lease for the available land.

—T.D.



a microscope on true irrigation requirements and reduced them considerably," Schulmeister replied.

The way he reads the commission's decision, it reduced the amount of water allowed from Well 7 because addressing system losses was going to be costly, Schulmeister said. He also said he believed the commission meant 9.5 mgd to be a floor, not a ceiling on what could be pumped from Well 7.

He stressed to the court that it needed to focus on water availability during low flows, rather than average flows. If IIFS are rooted too much in average flows, they could leave little to no water for offstream uses during low flow periods.

Moriwake, who insisted that 9.5 mgd was a ceiling, pointed out that HC&S will almost never have to use that much water from Well 7 because Na Wai 'Eha will meet all of its water needs under the commission's IIFS, 90 percent of the time.

When asked to respond to Schulmeister's warning about the use of averages leaving no water available at times, Moriwake said that was an argument HC&S had repeated throughout this case. The problem is, it places the burden of low flows on instream uses, he said.

Finally, with regard to HC&S's burden to remedy system losses, Moriwake pointed out that the commission didn't state in its decision that there was a direct tradeoff between the cost of pumping Well 7 and the cost of system repairs.

He added that HC&S didn't even provide the commission with the cost of such repairs.

### ***T&C, Appurtenant Rights***

The Water Commission's decision failed to protect appurtenant rights or even consider customary and appurtenant rights. And by failing to restore any water to 'Iao and Waikapu, the commission denied appurtenant rights, attorney Pamela Bunn, representing the Office of Hawaiian Affairs, argued.

"Downstream user rights were completely cut off" in those streams, she said. "Nothing has to remain in the stream below the diversion for downstream users."

The commission should have accommodated kuleana users who take water from the stream in its IIFS calculations, she said.

She added that although the commission recognized that traditional and customary rights existed and that those rights were impaired in Na Wai 'Eha, the decision's two to three pages describing how the commission balanced the various uses include nothing about traditional rights or the public trust.

"It appears to be a black box balancing," she said.

When asked by Chief Justice Mark

Recktenwald to respond to Bunn's argument that CWRM failed to expressly consider traditional and customary water uses, China assured him that the commission had considered the court's Ka Pa 'akai decision. (The court's September 2000 decision in *Ka Pa 'akai O Ka 'Aina v. Land Use Commission* found that state agencies needed to investigate and identify traditional and customary practices impacted by an action, and take steps to mitigate those impacts.)

"Where are the findings of the intent to mitigate that impact?" Recktenwald asked.

China said simply that the commission, in prioritizing its resources, chose to restore the streams that would benefit stream fauna the most with mauka-to-makai flow.

"Waikapu never flowed mauka-makai. 'Iao Stream, from 2.5 miles up, was concrete and it's got a 20 foot-drop," she said.

Recktenwald pointed out that that concern went to wildlife habitat suitability, rather than use by Hawaiians.

"Native Hawaiian practices also include gathering of wildlife," China replied.

And what about taro production, Recktenwald asked.

That was done mostly with offstream water, she said.

Revisiting the decision not to restore

Waikapu Stream, Acoba noted that all parties to the contested case had agreed to allow water to flow to determine impacts on Waikapu, but the commission decided not to.

"There was testimony that said you should test. ... When you do that, some kuleana water users would be losing water. There was competing testimony whether it ever flowed mauka-makai," China said.

"That's the reason for the test," Acoba said.

By the close of oral arguments, Acoba, at least, did not seem convinced that the commission had followed the court's directives in its Waiahole Ditch decision with regard to holding diverters of water for commercial use to a higher standard.

"I didn't see the commission say, 'Start with the presumption that water is to be used for public enjoyment [and that] private diversions are subject to higher scrutiny.' I saw a recitation of Waiahole but no application" regarding higher scrutiny of private users, Wailuku Water Company and HC&S, he said.

"There was a higher level of scrutiny," China said. "When the permits are issued, the commission will look at commercial users with a higher level of scrutiny."

"You have their word for it?" Acoba asked.

"It is in their decision of what the IIFS should be," she said.

— T.D.

## ***For Further Reading***

*Environment Hawai'i* has published several articles (available at [www.environment-hawaii.org](http://www.environment-hawaii.org)) that will provide additional background to the disputes over surface water in East and West Maui:

### **WEST MAUI**

- "Commission Struggles with Conflicting Claims Surrounding West Maui Stream Diversions," February 2006;
- "Finally, a Schedule for Contested Case Over Charge of Wasting Maui Stream Water," January 2007;
- "Hearings Begin in Contested Case over Diversion of West Maui Streams," "USGS Seeks Temporary Releases For Study of Instream Values," and "Wailuku Water Co. Sells Ditch Water Without Consent of Utilities Commission," December 2007;
- "Commission Tightens Grip on Waters of Central Maui," May 2008;
- "Wailuku Companies Seek PUC Approval to Serve Existing, Future Water Users," November 2008;
- "Hearing Officer Issues Recommendations for Na Wai 'Eha Contested Case Hearing," June 2009;
- "Commission's Order on Na Wai 'Eha Baffles is Most Experienced Member," "EDITORIAL: The Water Commission: An Idea Whose Time Has Passed," "Maui Agency is Sued Over Plan to Have A&B Put Stream Water in Municipal System," and "Environment Hawai'i Questions Miike on Dissent in Na Wai 'Eha Decision," July 2010.

### **EAST MAUI**

- "Battle Looms Over Waters Diverted from East Maui Streams" and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.
- "Board Talk: Contested Case on Renewal of EMI Water Permits," July 2001;
- "Board Talk: East Maui Water Dispute Heats Up with Hearing Officer's Recommendation," January 2003;
- "Battle Looms Over Waters Diverted from East Maui Streams" and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.
- "Board Talk: East Maui Water Dispute Heats Up with Hearing Officer's Recommendation," January 2003;
- "Board Talk: Land Board Favors EMI Water Diversion," March 2003;
- "Ex-Judge Says East Maui Farmers Don't Need More Water for Taro," August 2006;
- "Commission Gains Funds, New Tools to Pin Down Water Use, Stream Needs," September 2006;
- "Land Board Orders EMI to Release Water to Meet Needs of East Maui Taro Farmers," May 2007;
- "Water Commission Amends Standards for Six Diverted East Maui Streams," and "Land Board Resumes Discussion of Diversion of East Maui Water," November 2008;
- "Water Commission Amends Flows For Six of 19 East Maui Streams," July 2010;
- "Water Commission Denies Hearing on Flow Decisions for East Maui," November 2010;
- "Commission Inaction Frustrates Legal Appeal of East Maui Stream Decision," November 2011;

*Jurisdiction from page 1*

In particular, constitutional protections for Hawaiian practices and the state Water Code give the Office of Hawaiian Affairs — a co-appellant — and its beneficiaries an undisputed claim of entitlement, added attorney Pamela Bunn, who represents OHA in this case.

"Doesn't the constitutional protection limit itself to property rights?" Acoba asked.

"It is a property right," she said.

To which Acoba asked, "You want to limit it to property rights?"

Bunn later clarified that perhaps they were using the term "property interest" differently, noting that in another Supreme Court case (*Pele Defense Fund v. Puna Geothermal Venture*), a property interest was defined as a benefit to which the claimant is legitimately entitled, not necessarily a vested property right.

*Rebuttals*

To deputy attorney general Julie China, the public trust is incompatible with any private property right.

She argued that the court had jurisdiction in the Waiahole case only because water use permits affecting individual rights and the IIFS were being issued for the same streams. In the Na Wai 'Eha case, only IIFS are being set, she said.

"Amending IIFS is more like the Ko'olau Ag case, where designation of a Water Management Area was at issue," China said. In that case (*Ko'olau Agricultural Co. Ltd. v. CWRM*), the court found that CWRM's decision to designate a Watershed Management Area (WMA) in Windward O'ahu could not be appealed in court. Among other things, the court found that the designation, unlike water use permitting, "neither affects any property interest of existing or potential water users nor requires the determination of any individualized facts."

Acoba noted that in the Puna Geothermal case, the court found that if a party's constitutional rights are affected by the granting of a permit to another party, that mandated a contested case hearing and gave the court jurisdiction.

"Is that similar to Native Hawaiians in this case?" he asked China.

"No. No one has any due process property right," she replied.

"I'm not talking about a property right. I'm talking about a constitutional provision to protect Native Hawaiian traditions," which are not specifically tied to due process rights, Acoba said.

China argued that the protection of traditional and customary practices is not absolute,

but is subject to the right of the state to regulate such rights.

"Are you saying Native Hawaiians don't have any water rights?" Justice Sabrina McKenna asked.

China repeated that no one can have a public trust property right in water.

Justice Paula Nakayama then raised the issue of a kuleana landowner in the Na Wai 'Eha area whose ability to grow taro is limited by the diversions of commercial users.

"He doesn't have any right to challenge [the IIFS decision]?" she asked.

Although he has no due process property right, his kuleana right would be addressed when CWRM issued water use permits, China said. (Because Na Wai 'Eha is a designated surface water management area, current and future offstream users of water must obtain a permit from the commission.)

"What if there's no water?" Chief Justice Mark Recktenwald asked.

*"The Waiahole decision requires the commission to 'start out with a presumption of the right of the people to access and enjoy water.'"*

**— Justice Simeon Acoba**

The commission will have to do some balancing, China said.

"It's more than just balancing," Acoba interjected, pointing out that the Water Code states that it shall not abridge or deny traditional and customary rights.

"Such rights shall include cultivation or propagation of taro. What you said has to be qualified," Acoba said.

Not if there's insufficient stream water, China replied. "Then there's going to have to be balancing by the commission."

"I don't think that's the case here. We're talking about a situation where apparently there is water," Acoba said. And to China's insistence that no one has a legitimate claim or entitlement to water, Acoba pointed out that the court's Waiahole decision requires the commission to "start out with a presumption of the right of the public to access and enjoy water."

Acoba later asked Moriwake whether the court's Waiahole decision in 2000 overruled its 1996 Ko'olau Ag decision limiting appeals to the permitting process.

"Ko'olau didn't address the point of IIFS," Moriwake said, adding that WMA designation simply determines whether a resource is threatened or not.

The IIFS process is "the make or break process" to address the needs of those with constitutionally protected rights. People with rights to exercise traditional and customary

practices don't have to apply for a water use permit and those with kuleana rights automatically get one, he said.

*East Maui*

A number of Native Hawaiian Legal Corporation's attorneys attended the Na Wai 'Eha oral arguments, notebooks in hand. The NHLC represents Na Moku 'Aupuni O Ko'olau Hui, which is contesting the CWRM's decision on IIFS for 19 East Maui streams. The court's decision regarding its jurisdiction in the Na Wai 'Eha case will have a direct impact on NHLC's current appeal before the Intermediate Court of Appeals.

After holding lengthy public hearings in 2010 in response to Na Moku's 2001 petition to amend the IIFS of about two dozen East Maui streams, the commission decided to significantly restore a few of them, provide minimal flow to a handful of others, and maintain the status quo for the rest. The

NHLC requested a contested case hearing on CWRM's decision regarding 19 of those streams, arguing that the commission failed to take into account the needs and rights of Native Hawaiians in setting the IIFS.

Unlike Na Wai 'Eha, the IIFS were not determined by means of a contested case hearing and the watersheds involved have not been designated as surface water management areas. And because East Maui is not a designated Water Management Area, no CWRM permits for offstream uses are required. A license or lease from the state Board of Land and Natural Resources, however, is required for the East Maui Irrigation Company and/or its parent company, Alexander & Baldwin, Inc. to divert water via their irrigation system, most of which crosses state land.

CWRM rejected NHLC's petition for a contested case hearing on the IIFS. The NHLC appealed to the ICA, but has been waiting for months for the ICA to act on the case. (The ICA issued its first ruling in the case last fall, holding that the CWRM action was not appealable because it was not a final decision. The Supreme Court remanded that decision back to the ICA, however, where it awaits further action.)

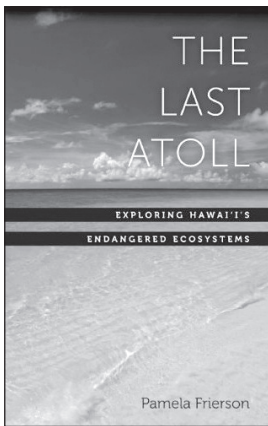
Like the Na Wai 'Eha appellants, Na Moku has argued that the Hawai'i Supreme Court's Waiahole ruling stated that constitutional due process mandates a contested case hearing for IIFS.

**— Teresa Dawson**



## REVIEW

## The Lessons that Atolls Can Teach



Pamela Frierson.  
*The Last Atoll: Exploring Hawai'i's Endangered Ecosystems.* Trinity University Press, 2012. 285 pages + notes, bibliography, and index. \$16.95 (paper).

It took author Pamela Frierson more than a decade to work her way up the jewels in the necklace of the Northwestern Hawaiian archipelago and write up her experiences, but the end result was worth it. Frierson, who is a lifelong Hawai'i resident, is not just an elegant wordsmith, but also a dedicated environmentalist who has spent years volunteering in the remote atolls. Her toils – painstaking (and often painful) weeding, tagging, counting, chasing seals – are recounted in *The Last Atoll*, giving readers an unvarnished picture of the challenges faced by the animals and humans alike who dwell on and around these tiny “water-girt worlds,” to use Frierson’s felicitous phrase.

But the take-home message is not that these islands are a world apart from the one we inhabit. Rather, they are joined with our own to such a degree that almost everything that transpires in the human-populated world has larger-than-life consequences for these mostly uninhabited specks of sand and land. Or, as Frierson puts it, “Like these islands, all of us are being pulled into unknown waters, into a different climate, with the dynamics of earth systems increasingly driven by human-caused alterations. Islands, not singly so much as bound together in the ocean’s watery web, had something to teach us, I felt, about cycles of life in a changing world.”

Thus, one of the first things Frierson does is disabuse the reader of any notion that these islands are in a state of natural grace, untouched by civilization. In Chapter One, she discusses Tern Island, a former Coast Guard LORAN station, describing it as “post-Cold War ghost town,” with abandoned, asbestos-laced buildings housing tangles of guano-encrusted wires.

Originally just 11 acres in size, the island

expanded to 53 acres during World War II, when it was used as a refueling station for warplanes. The corroding steel seawall used to hold in the sand – the “steel corset” girdling Tern, as Frierson puts it – is a blessing and a curse: without it, much of the island would collapse into the sea, but in its current decrepit state, it is a death trap for the birds that stumble into its cracks and crevices.

Weaving together both natural and political-social histories, Frierson educates without being pedantic. For those readers – including this one – who think they have a good understanding of the events that led up to the current state of affairs, she manages to serve up a surprisingly large helping of obscure but fascinating facts. In 1896, for example, when the German naturalist Hugo Schauinsland visited Laysan, the native loulu palms were long gone (thanks to H. Hackfield’s guano-mining operations), but sandalwood still grew “luxuriantly on the northwest side” of the island.

Above all, the book is about the non-human inhabitants – the millions of albatrosses, noddies, boobies, terns, petrels, frigate birds, the seals, and the sea turtles – that rely on the northwestern Hawaiian islands for their very survival. Their stories never fail to amaze, and in Frierson’s gifted words, they are riveting.

Consider the impressive navigational skills and site fidelity of the albatross. These birds fly thousands of miles of open ocean, yet are able to return, uncannily, year after year, to the same square meter of land for nesting. “An albatross will likely never land on any other island, on any other patch of land in its life, than its birthplace,” Frierson writes. “Not only does the Midway albatross return to its home island, but the bird gets as close as possible to the exact spot of the nest where it was raised.”

An albatross will return to its nesting spot “even if it has changed for the worst, in fact even if it has lost nearly all the qualities that made it attractive in the first place,” Frierson writes. And so, on Midway’s Sand Island, Laysan albatross “nest thickly near some of the buildings, where the birds must have faced much disturbance.” Even in ironwood forests, “one comes across Laysans laboriously waddling through the woods to nesting sites deep among the trees,” even as seemingly attractive, open areas are much less densely populated. Those are areas created by the

military with fill during World War II, “and the albatrosses have still not fully claimed it,” Frierson says.

As abundant as the birds seem to be, and as concerted and extensive as restoration efforts have been, their populations face grave risks nonetheless. High levels of toxins – including PCBs and DDE – are showing up in both black-footed and Laysan albatrosses. Expected results include thinner shells (leading to less successful hatch rates), drooping wings, and other birth defects.

The problems associated with ubiquitous plastic pollution in the ocean are more visible, if no less serious. The skeletal carcasses of young birds, rib cages enfolding hundreds of grams of assorted plastic waste, are to be found everywhere albatross nest.

Perhaps the most subtle problem of all is the one that will be the most difficult to address: climate change. “Predicted sea level rise in this century could claim anywhere from 3 percent to 65 percent of terrestrial habitat on the lowest Northwestern Islands,” Frierson writes. She then asks biologist John Klavitter, who has devoted his career to restoration projects in the archipelago, how he looks “at the grim possibility that climate change could undo hard-won gains.”

“Not happily,” he replies. “At French Frigate Shoals, we’ve already seen some erosion, with one tiny island, Whale-Skate, disappearing completely. No one can say absolutely global warming is the cause – these very small islands in a lagoon system are ephemeral. But we can look at the effect and start planning.”

The disappeared island left female monk seals with fewer desirable areas to pup. As a result, Klavitter says, fewer of their offspring survived.

In the first three months of 2011 alone, nature delivered a series of devastating blows to the islands. Storms in January and February decimated the Laysan and black-footed albatross chicks. When the tsunami following the March earthquake in Japan reached Midway, it hit the survivors hard. Altogether, more than a fifth of the young albatross – more than 110,000 – died, and at least 2,000 adult albatross were killed.

Yet Frierson ends her book on a note of hope, recounting the fate of the celebrated short-tail albatross chick, the first ever recorded in the Hawaiian archipelago. Following the January storm, she writes, Klavitter surveyed the area of the chick’s nest. “My heart sank,” he told Frierson. “The whole area . . . was washed out, all the albatross nests destroyed, dead chicks everywhere.”

“With little hope left, he checked the naupaka bushes a hundred feet inland. There

## BOARD TALK

# Maui County Council Remains Skeptical Of State Urbanization Plans for Pu'unene

The Maui County Council is standing in the way of the state's efforts to develop the commercial potential of nearly 700 acres of state-owned land in Pu'unene. The Department of Land and Natural Resources' Land Division has appealed to the council to include the lands in the Maui Island Plan Urban Growth Boundary.

The county is currently reviewing a draft general plan that will direct the island's growth through the year 2030.

At present, the land is under a revocable permit to Alexander & Baldwin, Inc., for agricultural purposes. The county and Maui Electric Company have utility easements across it.

The general area includes sugarcane fields owned by Hawaiian Commercial & Sugar Co. (an A&B subsidiary), and land controlled by the Department of Hawaiian Home Land, Maui County, and Pacific Rim Land, Inc..

For the past few years, the state Department of Accounting and General Services, on behalf of the Department of Public Safety, has been looking to build a new prison on land in the area near Mokulele Highway, but Maui's planning director has so far opposed the idea.

"Because there are several state agencies seeking to develop projects in the area, the agencies formed an interagency working group to pursue the coordinated, cost-effective development of their various lands/projects," according to a report to the Board of Land and Natural Resources by Land Division planning and development manager Keith Chun.

The county has asked DAGS to move the proposed prison away from the highway, Land Division administrator Russell Tsuji told the Land Board during a June 8 briefing.

"There's been a lot of resistance from DAGS. DLNR and DHHL have been trying to cooperate as best as we can," he said. "We

he found the chick, bedraggled but very much alive."

When the March tsunami struck, "Once again the short-tail chick went on a wild ride. Amid thousands of injured or dead albatrosses he was, once again, a survivor. On June 11, 2011, the gawky but healthy adolescent left Midway to become a citizen of the North Pacific until, a few years from now, his hormones urge him home." — *P.T.*

really don't have any preference where the jail goes. ... Anyway, that was kind of a problem and still is."

The County Council has already voted down the DLNR's request to put its 700 acres inside the urban growth boundary, despite a plea from Tsuji that the DLNR needs the change to generate revenue.

"Particularly on Maui, we don't have a lot of large tracts of lands that could be income producing. ... We have a lot of taro RPs [revocable permits], two wind leases. One small hotel in Kihei generates only \$80,000 a year," he said.

Tsuji had also enlisted Public Lands Development Corporation executive director Lloyd Haraguchi in his effort.

Haraguchi told the council that he intends to work with the county on everything and not run the project through without consultation, Tsuji said. He added that Haraguchi's agency does not yet control the DLNR's lands, but certain council members "had a lot of questions and still a lot of concerns," and some even proposed designating the DLNR's land for preservation.

This was despite Tsuji's assurances that any land transfers from the Land Division to the PLDC must be approved by the Land Board at a public meeting, and that PLDC meetings are also open to the public.

"I wanted to let you know we are having a very hard time with the county council," but it has invited the DLNR to develop a master plan for the area that can be presented to the community in August, Tsuji said.

When O'ahu Land Board member John Morgan asked where A&B was in these discussions, since HC&S farms land in the area, Maui member Jerry Edlao said it's likely that A&B has got other projects in the works and "wants to stay away from this [and not] get dragged in and get a bad taste on themselves."



## Aeby Gets NWHI Permit, But Won't Join Cruise

Greta Aeby may not be joining the next research cruise to the Papahānaumokuākea Marine National Monument, but her study of coral diseases in the Northwest-

ern Hawaiian Islands will continue. Dr. Steve Karl, a colleague with the Hawai'i Institute of Marine Biology, will be the principal investigator. Co-investigators Sean Callahan, Fenny Cox, and Frank Stanton, and three graduate students will assist him.

On June 8, the Land Board approved a permit to Aeby allowing her team to survey shallow reefs, tag colonies, and take as many as 830 coral tissue samples from diseased areas.

The permit allows her to renew work she had done in the monument before a permit violation in 2006, for transporting live organisms outside the monument, barred her from returning. Despite recommendations in the last couple of years from the DLNR's Division of Aquatic Resources (DAR) to grant Aeby a permit to resume her disease research, she has not returned.

"I'm not able to go up this year," Aeby told the board. Instead, she will train Karl's students in Kane'ohe Bay to spot disease and collect samples. "For better or worse, Kane'ohe Bay has a lot of disease. It makes it easier to train."

KAHEA: the Hawaiian Environmental Alliance submitted written testimony opposing DAR's recommendation to approve Aeby's permit request, stating that the agency's rules for the monument prohibit the Land Board from issuing a permit to anyone who had violated a previous monument permit.

The Land Board unanimously approved the permit, as well as a few other permits to conduct research in the monument and one to film a documentary for the BBC on shark predation of albatross chicks.

Marc Lammers received a permit to deploy underwater listening devices in deep waters (200 meters) to identify any as-yet unidentified biological noises. Karl also received a permit to conduct coral disease and fish interconnectivity research.

"I've been here six years. This has been going on and on and on," Maui Land Board member Jerry Edlao said of Karl's fish interconnectivity research. "Are you guys not getting it? ... Is this a forever kind of thing?"

Karl said that it has been taking a while to collect all of the 30 species he wants. "We're down to the last few species we've been targeting," he said. Under his current permit, he hopes to collect eight species.

So far, Karl has been able to determine that there are sites in the NWHI where 90 percent of species are not mixing, but "it's not black and white. It's a hodgepodge."

"There are certain trends but also certain exceptions," board member Sam Gon suggested, and Karl agreed. — *T.D.*



The office building (foreground) and conference room of the Gateway Center at Keahole.

## Legislative Audit of NELHA Highlights Sunshine Law Concerns, Lack of Transparency

The findings in legislative auditor Marion Higa's report on the Natural Energy Laboratory of Hawai'i Authority (NELHA) should come as no surprise to anyone who has been keeping up with that agency through the pages of *Environment Hawai'i*.

The report, which was released to the public in late May, has little good to say about NELHA's management since 1990. That was when the present administrative structure of NELHA was formed by the merger of the Hawai'i Ocean Science Technology (HOST) Park and the adjoining Natural Energy Laboratory of Hawai'i.

There's the turnover in management: "Prior to the new administration, the authority had at least 21 heads in 37 years, the longest serving of whom served from 2005-2011," the report states. (Although not mentioned by name, Ronald Baird, who was NELHA's director for that six-year term, comes in for particularly scathing criticism from the auditor.)

Lack of transparency is another major issue that the auditor addresses. Although transparency and accountability have increased since Baird left and Greg Barbour took over last June, "there is still work to be done," the report states.

Here are some of the report's highlights. The full 51-page audit may be found on the legislative auditor's website:

<http://www.state.hi.us/auditor/>.

### **The RAC**

NELHA's Research Advisory Committee, au-

thorized by statute, "is inappropriately operating as a 'permitted interaction group' in violation of the Sunshine Law," the report states. A permitted interaction group, the audit states, "can be used for investigatory purposes and necessarily involves at least three board meetings and has a finite duration." However, the RAC has virtually no public meetings, with its members commenting on proposals through email exchanges.

University of Hawai'i geochemist Don Thomas is the committee chairman, who customarily provides the RAC recommendations to the full NELHA board. He informed

Higa's staff that his committee, precisely "because of 'Sunshine Law' requirements," did not recommend to the board that it accept or reject prospective tenants' proposals. Rather, the RAC merely identified technical issues, possible financing challenges, or regulatory concerns that the board could do with as it liked.

"This practice is of concern," the audit states, "because the RAC chair appears to believe that the RAC is legitimately circumventing Sunshine requirements by behaving as a 'permitted interaction group.'"

"There are several problems with this approach, and the Office of Information Practices concurs with our analysis," the audit notes, and goes on to list at least four ways in which Sunshine Law compliance is required of the RAC. "The plethora of issues raised by the RAC's scenario, combined with the apparent belief by its chair and the board that this behavior is legitimate, serve to highlight the board's lack of understanding about the scope of the Sunshine Law and the board's responsibilities under it," the report states.

### **Sunshine Shortfalls**

"Failure to understand basic Sunshine Law requirements hampers interested parties — such as tenants, private organizations (like *Environment Hawai'i*) and notably prospective tenants or other stakeholders — from discerning the board's activities and methods," the report states. Although NELHA has a policy to give an orientation to new board members, it has no formal training program — and in any case, "the orientation described in the policies and procedures manual does

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not include a review of [the] Sunshine Law," the audit found.

Last November, an OIP attorney gave a 15-minute presentation on the law's requirements to the board. "While we applaud this effort," the report says, "we believe more comprehensive training is in order... The OIP provides Sunshine Law training upon request; its shortest training is approximately 45 minutes long, and its normal training is about two hours long."

The audit makes special mention of two matters raised by *Environment Hawai'i* in the course of our coverage of NELHA: our concerns over the apparent lack of executive committee minutes, and the convening of a board meeting without public notice.

"In 2006," the report states, "a private organization contacted OIP regarding access to executive session minutes from three years prior.... The authority subsequently re-created the previously missing minutes and provided limited access to them."

"In 2007," the report goes on to say, "the same private organization complained about not receiving notification of a board meeting despite being on the list of those to receive notice... The authority conceded this violation as well by voiding all action taken at the improperly noticed meeting and effectively re-doing all actions at a subsequent board meeting." At the improperly convened meeting, the board approved issuing a lease to Megasoft and its fly-by-night owner, Venu Pasupuleti, for a wholly improbable computing facility; for details, see the May 2007 issue of *Environment Hawai'i*.

Altogether, the audit notes, "Seven complaints, several with multiple Sunshine issues, have been brought against the authority's board since 2001. Of these, the board violated Sunshine in at least five instances."

### ***A Stalled Master Plan***

The auditor questions many of the operational issues at NELHA, including a lack of uniform lease rent rates, lack of transparency in developing charges for seawater deliveries

to tenants, and an absence of performance reporting. Its website (<http://www.nelha.org>) is "outdated and incomplete."

Lease execution is "sloppy," the auditor found; "Of 26 lease-type agreements reviewed, less than one-third were properly executed. The deputy attorney general usually did not date his signature. In one case, the agreement date was so illegible that it was unclear whether it was January or June, and the signatures were at least six months after the effective date and possibly 13 months after the agreement date. In another, the agreement date was blank and there were no dates on the signature page ... Although such breaches do not invalidate the contracts, they do raise concerns about the authority's and its deputy attorney general's diligence generally in executing tenant leases."

Fiscal information provided to the board is "unreliable," the report states, with the management using a commercial program (QuickBooks) for in-house reporting that is not reconciled with the state's program.

NELHA controls land that is leased from the state Department of Land and Natural Resources, which requires that the agency have a master plan. Up until last August, the official governing master plan was one crafted in 1976. As the auditor notes, the updated master plan was six years in the making. *Environment Hawai'i* reported on this stalled plan in March 2011, by which time the plan was complete but the contractor, Group 70, had yet to receive any payment for it.

"Reasons for the delay ... are hazy," the auditor found. According to one board member, "the consultant was given conflicting directions from the board and the then-executive director, who ignored board input and gave contrary advice to the contractor as to how to proceed." A full draft plan was presented in 2009, but "NELHA staff refused to accept the final report until all numerical errors were corrected. According to both the consultant and current executive director, these errors were non-substantive ... Delay in finalizing the master plan hampered the

authority's ability to move forward with its plans, ultimately affecting fulfillment of its mission and the mandate to become self-sustaining."

### ***'Aggressive, Dismissive, Angry'***

NELHA executive director Ron Baird was routinely given positive performance evaluations in annual reviews by the NELHA board. Yet friction between Baird and staff was often apparent to people attending board meetings. His dealings with *Environment Hawai'i* bordered on the hostile; he refused to take phone calls or questions and advised staff (we were told) against talking to us. Uniform Information Practices Act requests were dealt with via post. The Keahole Point Association, made up of NELHA tenants, had difficulty dealing with Baird as well.

The auditor captures some of the flavor of Baird's tenure in the report. "Of the staff and tenants interviewed, many were concerned about the executive director's communication style or tone, which was described as aggressive, dismissive, and angry. Respondents reported the executive director did not engage with tenants and preferred leaving it to the board. Some perceived the executive director to be unfair or partial."

(Baird is now the government affairs officer for the Kona Civil Air Patrol. Last August, he was also named to a spot on the Kona Soil and Water Conservation District board, with a term ending June 2014.)

Since Baird's departure, "the authority has made significant progress in a number of areas," the report says.

Still, the report concludes with a series of recommendations that underscore how much work remains to be done to address the shortcomings it identifies. Many have to do with bringing the board into compliance with the Sunshine Law and other transparency issues. Other recommendations address such issues as staff training, development of key performance measures, and improved methods to derive seawater charges to tenants.

— **Patricia Tummons**