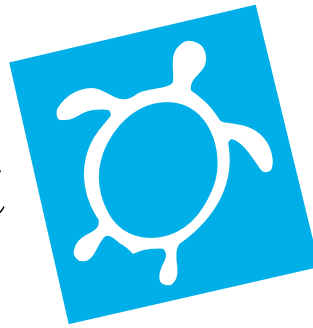


Environment



Hawai'i

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Stalemate at Turtle Bay

With no penalty for delay of game, no fine for failure to act, and small chance of public opprobrium, the Land Use Commission has decided not to decide an issue on whose resolution hangs the fate of a development that will change the face of O'ahu's North Shore.

For the time being, at least, the standoff continues between the developer and groups who want to see, at the very least, an updated environmental review to replace one drawn up a quarter century ago.

Perhaps when the Supreme Court forces it to act, the LUC members will show some spine. But as is clear from both the examples discussed in this issue – Kuilima on O'ahu, 'Aina Le'a on the Big Island – haste, deliberate or otherwise, is a stranger to the commission. And, as our coverage of the East Maui stream diversions suggests, the LUC's affliction has infected the Water Commission as well.

Land Use Commissions Tries But Fails To Resolve Dispute Over Kuilima Resort

The dispute between Kuilima Resort Company (KRC) and the community groups opposing its proposed 3,500-unit expansion of north O'ahu's Turtle Bay Resort is officially in limbo.

At the state Land Use Commission's February 4 meeting, commissioners came within one vote of putting an end to the April 2008 bid by the Defend O'ahu Coalition (DOC) to force KRC to defend the Urban designation of 236 acres owned by the company. The commission needed five votes to pass a motion by commissioner Kyle Chock to deny the group's request for an order to show cause why the land, redistricted in 1986, shouldn't revert to the Agricultural District. Of the six commissioners present, just four — Chock, Thomas Contrades, Duane Kanuha, and Nicholas Teves — voted to deny DOC's request. Commissioner Normand Lezy opposed Chock's motion and vice chair Reuben Wong abstained. A subsequent motion by Contrades to amend the LUC's 1986 redistricting order



PHOTO: SEAN DAVEY

An aerial view of Kawela Bay, where Kuilima Resort Company proposes to construct two hotels and a park.

was withdrawn after commissioners discussed legal issues in executive session.

Whether or not the LUC revisits the Kuilima issue any time soon, it was clear from the discussion at the meeting that some commissioners believe KRC has made substantial

to page 9

IN THIS ISSUE

2

New & Noteworthy

3

Water Commission Defers Vote On East Maui Stream Restoration

7

Progress at Puako

11

High Court Hears Arguments Over Kuilima

In Push to Cut State Budget, Lingle Deals Crushing Blow to Environment Programs

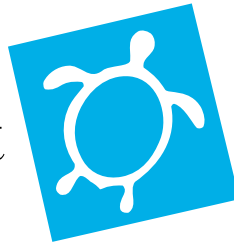
Almost daily, the reading public in Hawai'i learns of drastic cuts to the biggest social programs in state government – programs dealing with health care, education, social services. Unheralded in the press are the punishing blows that are being dealt to programs that account for just a tiny fraction of state spending – those dealing with environmental protection and conservation of natural resources. These programs, while small, are every bit as important to the state's economic recovery as are those that capture the headlines. Yet a close analysis of the spending

proposals of the Lingle administration shows that environmental programs are suffering in a way that is altogether disproportionate to their small budgetary profile.

For example, the Department of Land and Natural Resources accounts for less than one percent of the state's general fund expenditures in recent years. The whole department could be abolished, and the state's deficit would still be more than a billion dollars. But of the 1,990 positions statewide that Governor Lingle is propos-

to page 6

Environment



Hawai'i

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NEW AND NOTEWORTHY

PHOTO: GOVERNMENT OF QUEENSLAND



Brown tree snake

Snakes on Planes: The brown tree snake has long been among the most feared of potentially invasive species in Hawai'i.

An article in the current edition of *Pacific Science* sets forth in dire detail some of the economic reasons such fears are justified. Authors Stephanie Shwiff, Karen Gebhardt and Katy Kirkpatrick, all of the Department of Agriculture's National Wildlife Research Center in Fort Collins, Colorado, and economist Steven Shwiff of Texas A&M University looked at the potential blows to the state's economy should the reptile become established in the Hawaiian islands. Bottom line: the cost to the state in lost tourism dollars,

power outages, and medical treatment of snake bites "would range from approximately \$593 million to \$2.14 billion" a year. If even one percent of tourist traffic were lost as a result of the BTS, the result would be 1400 fewer jobs and a loss of revenue of \$137.8 million a year. If losses to tourism were as high as 10 percent – a level that the authors estimate is reasonable, given their surveys of tourists – the resulting economic impact could be \$1.4 billion a year and the loss of 13,000 jobs. The cost of treatment of snake bites, the authors found, was inconsequential in comparison to that of tourism losses and power outages.

The authors did not even attempt to estimate damage to other sectors of Hawai'i's economy, especially agriculture, and its native species, especially birds.

The article, "Potential Economic Damage from Introduction of Brown Tree Snakes, *Boiga irregularis* (Reptilia: Colubridae), to the Islands of Hawai'i," appears in the January 2010 edition (Volume 64, Number 1) of *Pacific Science*, published by the University of Hawai'i Press.

Another study published in the same issue ("Potential Distribution of the Alien Invasive Brown Tree Snake...") describes the vulnerability of other areas to invasion by the snake. Authors Dennis Rödder and Stefan Lötters attempted to identify areas outside the snake's existing range (Southeast Asia and Australia) where current conditions could lead to the snake's eventual establishment. Globally, they found a wide range of environments where the snake could thrive, including large areas of Central and South America, the broad coastal plain of the southeastern United States, and much of Africa.

Areas of greatest vulnerability, however, are those where accessibility and proximity, as well as lack of competing snakes, compound the risk. These include Hawai'i, Fiji, the Northern Mariana Islands, and New Zealand.

Invasives at NELHA: The Hawai'i Invasive Species Council report to the 2010 Legislature makes for some interesting reading. Among other things, it notes, the Aquatic Invasive Species Team (AIST) was notified by a pond foreman at one of the Kona resorts that he was concerned that a species of algae was invading one of the resort's ponds. The algae was determined by AIST to be *Gracilaria salicornia*, one of the most dreaded of invasive marine algae. According to HISC, "the source was traced back to an aquaculture facility in Kona at the Natural Energy Laboratory of Hawai'i Authority (NELHA)." The algae at the pond was eradicated by physical removal as well as by lowering the pond's salinity, the report states.

Concern over species brought in by NELHA tenants has been a longstanding concern – of existing tenants, environmentalists, and other state agencies. In 2005, the Board of Agriculture was sued over its failure to require preparation of an environmental impact statement for the introduction of so-called biopharm algae proposed to be grown at NELHA. That lawsuit resulted in a decision by the Intermediate Court of Appeals that the proposed importation was subject to Chapter 343, the state's environmental disclosure law.

More recently, a NELHA tenant, NoriTech, proposed importing a type of seaweed used for nori, and instead of preparing an environmental impact statement or environmental assessment to address the risks, it went the route of proposing that the Board of Agriculture change its rules to allow the algae to be put on the BOA list of species approved for importation. The Department of Land and Natural Resources' Division of Aquatic Resources objected strongly to the proposal, explaining that the species proposed for import had a number of characteristics that suggested it could easily become invasive. Last October, ignoring DAR's objections, the BOA approved the proposed change.

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Quote of the Month

"Who's the most important person on the earth? We are."

— William Balfour,
Water Commission

Water Commission Defers Vote On East Maui Stream Restoration

Deferrals are always anticlimactic, but there didn't seem to be any way the state Commission on Water Resource Management could have amended the interim instream flow standards (IIFS) of 19 East Maui streams based on the voluminous, yet sorely insufficient, data presented by its staff.

At the commission's December 16 meeting, hundreds of Maui residents packed themselves into the Paia Community Center and testified from morning to night on the staff's recommendation not to amend 18 of the 19 IIFS for those streams. The only stream that the staff recommended to receive more water — a temporary release of 0.32 million gallons a day — was Makapipi Stream.

The recommendation was Part II of the commission's effort to address a June 2001 petition filed by the Native Hawaiian Legal Corporation on behalf of East Maui taro farmers Beatrice Kekahuna, Marjorie Wallett, Elizabeth Lapenia, and a group known as Na Moku 'Aupuni O Ko'olau Hui. The farmers argued that the East Maui Irrigation System, owned and operated by Alexander & Baldwin's East Maui Irrigation Co., robbed them of water that they need to grow taro and to which they are entitled, and so they petitioned the commission to amend the IIFS of 27 East Maui streams. The irrigation system, which takes an average of about 160 million gallons of water a day from various stream diversions located mostly on state land, has dewatered East Maui for more than a century under

various state water licenses, the last of which expired in the 1980s. Faced in 2001 with a request by A&B to secure yet another long-term water lease for East Maui, the area's taro farmers, as well as the environmental group Maui Tomorrow, decided to push to regain the water needed for taro and for a healthy stream ecosystem.

In September 2008, the Water Commission addressed eight streams listed in the NHLC petition. The commission voted to maintain the status quo for Pi'ina'au and Kulani streams and to restore a total of about 12 mgd to Honopou, Hanehoi, Huelo, Palahulu, Waikamilo, and Wailuanui streams. Commission staff based the amounts largely on habitat needs and delved little into the water requirements for taro. Water commissioner Lawrence Miike explained at the time that the new interim standards were merely a jumping-off point and over the next year, the farmers and the state would have a chance to better quantify those needs.

More than a year later, the Water Commission staff recommended, for the most part, that the status quo be maintained for the remaining 19 streams. But faced with NHLC's claims that Hawaiian Commercial & Sugar (the A&B subsidiary that is the largest user of diverted water) was wasting water, and testimony against the recommendation from the state Department of Land and Natural Resources' Division of Aquatic Resources, among other things, the commission found that it could not proceed without more information.

It deferred taking action and directed its staff, the Maui Department of Water Supply, HC&S, and NHLC's clients to return to the commission this month with sufficient data to craft short, mid-term, and long-term restoration plans.

Status Quo

In its report to the commission, the main reason why staff recommended maintaining the status quo for most of

the streams was because they generally gained groundwater along most of their courses, and the amount they gained was "believed to be sufficient to support instream uses." The report also discussed at length the importance of the diversions to the island's domestic water supply, agricultural industry, tourism, and residents.

Hawaiian Commercial & Sugar manager Christopher Benjamin commended the staff for a "very thorough analysis." But the recommendations, and the analysis behind them, did not sit well with NHLC's Alan Murakami. In his 10-page critique of the staff's report, Murakami pointed out that the recommendation fails to analyze the impacts on or take steps to protect traditional and customary practices in accordance with the Hawai'i Supreme Court's 2000 decision in the *Kapa'akai v. LUC* case.

The staff submittal "relegates its analysis of traditional and customary practices to a mere two sentences, acknowledging NHLC submissions, but reacting by deeming that no taro growing exists along 18 of 19 streams. In the case of Makapipi, it acknowledges a claim of taro growing but discounts that it currently exists. The current nonexistence of taro growing says nothing about the past practices, or the potential to restore such practices in the future, which the commission must consider. There is no mention of traditional and customary practices, or the effects of continued diversions from these 19 streams on these practices, in complete disregard of the 22 declarations submitted by cultural practitioners at the April 10, 2008 CWRM Public Fact Gathering Meeting," he wrote.

Murakami also restated an argument he has made over the years regarding who bears the burden of proving the diversions have an adverse impact on the rights of others. He complained that staff gives far too much weight to the impacts stream restoration may have on private commercial interests when it should instead be investigating the impacts diversion has had on his clients.

"Na Moku, et al., need not, at this point, establish their entitlement to water from the diverted streams or that those entitlements are or will be adversely impacted by the proposed diversions. It has already filed declarations meeting the threshold requirement to alert the CWRM that traditions and customs exist or would continue or be re-established, were it not for the EMI diversions. Under the applicable common law to justify any diversion, A&B and/or the State of Hawai'i must first identify the universe of rights potentially affected by the proposed action. *Robinson [v. Ariyoshi]* makes



PHOTO: DLNR

Researchers measure the flows in a tributary of Waikamoi Stream, one of 27 streams included in a petition, filed by East Maui taro farmers, to amend interim instream flow standards.

clear that before any proposed transfer of water outside the watershed of origin, whether for an hour, a day, a week, a month, or thirty years, may be authorized, 'those seeking the transfer' must demonstrate that the 'transfer of water [i]s not injurious to the rights of others.'....

"Certainly, A&B must not be allowed to continue to avoid and escape the consequences of the same law that it previously successfully relied upon to prevent out-of-watershed diversions from Wailuku River," he wrote, referring to a 1904 case granting HC&S an injunction against Wailuku

commission chair and DLNR director Laura Thielen proposed framing the commission's discussion in terms of short-term, mid-term, and long-term goals.

"In retrospect, we were asking too much of staff to take [the stream] information and look at the law to come up with a recommendation. The information on the streams is excellent. The other side, the uses, is not quite sufficient yet," commissioner Miike said.

In response to a question by commissioner Neal Fujiwara about whether the staff used the same process to draft recom-

for you and I, it's awful important, folks... Who's the most important person on the earth? We are," he said.

HC&S's Rick Volner shared Balfour's concerns about the dry season and Benjamin, the HC&S manager, asked whether any amended IIFS could be adjusted seasonally.

Volner said that for the 30,000 acres of sugarcane watered by the EMI system, about 204 mgd are needed when evapotranspiration is figured in. If the system diverts 166 mgd on average and the needs are 204 mgd, "that's already a deficit," he said. (Groundwater has been used in the past to supplement the company's needs and has recently provided nearly 50 percent.)

A representative from the Maui Department of Water Supply testified that its upcountry users, which rely on the diversions, require about 6 mgd in the winter and up to 10 mgd in the summer.

With regard to the amount of water required to improve stream habitat to the level DAR had suggested, Polhemus did not offer any figures, but basically said any improvement would be better than the status quo. He added that his division does have the tools to calculate the amounts needed.

Murakami didn't offer any numbers either, but had some questions of his own about the actual amount being diverted. He noted Balfour's claims of a low of 12 mgd and a high of 450 mgd.

"I've heard 21 mgd and 317 mgd. Which is it? I hear HC&S saying the latter," he said, adding, "In low periods, why can't groundwater be used more heavily?"

Murakami did say that DAR's proposal didn't seem unreasonable, but that until he saw how it worked and translated to water on the ground, it was difficult to respond to it. "As a concept, it doesn't sound like a bad short-term solution. I want to see water as

"In retrospect, we were asking too much of staff to take [the stream] information and look at the law to come up with a recommendation."

— Lawrence Miike, commissioner

Sugar Company, which prevented the latter from diverting water from Wailuku Stream during certain times and from certain ditches.

Murakami asked that, as a minimum, the commission require A&B to "return a sufficient amount of water to streams to restore habitats to support the cultural practices of my clients and others."

In his testimony, Dan Polhemus, administrator for the DLNR's Division of Aquatic Resources, also recommended that the commission do more to improve stream habitat. Maintaining the status quo for all but one of the 19 streams was unacceptable, he wrote, and he recommended that flow be returned to eight of those streams. Instead of recommending a specific amount of water, DAR recommended that diversion structures on Honomanu, Puohokamoa, Waikamoi, Kopili'ula, East Wailua Iki, West Wailua Iki, Makapipi, and Hanawi streams be modified to provide for animal passage and/or suitable habitat. Those modifications would restore 45.8 kilometers of native species habitat units out of a total of 67.3 kilometers currently lost as a result of the irrigation ditch's major diversions.

"They therefore represent a significant return of ecological function based on a modest investment in flow restoration, and we urge their favorable consideration," Polhemus wrote.

The Morning After

After an entire day of emotional testimony from more than 200 people, the commission took a break and reconvened the next morning. In an attempt to tackle all of the complex issues the testifiers had raised,

mendations for the first eight streams and the 19 remaining streams, Ken Kawahara, the commission's executive director, said he didn't think the process was different, but the information used was. For the first eight streams, he said, there were 30 registered taro diversions. For the 19, there was only one.

"That's not to say there couldn't be restoration in the future," he said, adding that staff had sought public input on that kind of information.

The commission took about two hours prying more information from HC&S, the DWS, and NHLC's Murakami on their water needs.

"If we find that out of 177 mgd that is diverted, 150 mgd is needed while 27 is put back, there is no economic impact on offstream uses. By policy, the commission should not ascribe economic impact to inefficiently used water. If we put 40 back, then we begin cut into reasonable uses and that's where we would have to assess economic impact," Miike explained.

Commissioner William Balfour worried that there wouldn't be enough water for offstream use—domestic use, in particular—in dry periods.

"If we talk about putting water back into the stream, we're already doing 12 mgd plus or minus...on the first eight streams. Say 12 mgd is a good number. On a very, very poor day on the stream, that's the whole ball of wax, there's nothing left. Domestic water



Many of the East Maui Irrigation system's diversions, like this one, are designed to take the base flow of streams.

soon as possible in any form," he said.

After a short break, Thielen read a possible motion she had drafted, which Miike then offered as his own: Defer the action on the staff's recommendation and direct it to investigate short-term, mid-term, and long-term solutions to the petition.

With regard to the short-term, Miike directed staff to return in March with a recommendation on the possibility of implementing season-dependent restoration. Staff would work with the interested parties to identify minimum offstream needs in both wet and dry seasons, and to determine the maximum restoration value of each stream based on its hydrology, habitat, and the ability of the diversion infrastructure to be altered. Staff would also work with the DAR to identify which of the diversions are capable of being altered to increase recruitment of stream organisms and to prevent their entrainment.

For the mid-term goals, Miike requested that, by March, the Maui Department of Water Supply present a timetable, cost, and funding sources for distribution system repairs. HC&S was asked to present information on alternative water sources and data on its groundwater wells, including their capacity, pumping costs, and sustainable pumping levels. NHLC was asked for information on possible new lo'i development or expansion, including acreage, a timetable, and costs.

Finally, to address concerns about changes in water use over the long term, Miike directed the DWS to return in March with information about how it plans to reduce its reliance on surface water. HC&S was directed to present its ideas and cost, time, and location details for alternative longer-term sources.

The commission unanimously approved Miike's motion.

Backlash

While the commissioners clearly appreciated DAR's testimony, chair Thielen was apparently displeased that it was submitted at the last minute. According to a February 2010 *Hawai'i Fishing News* article, "DLNR: Department of Lies, Nonsense and Ridicule," by environmental activist Carroll Cox, Thielen suspended Polhemus after the December meeting.

Cox wrote that DAR had surveyed the 19 streams and submitted detailed reports in November on their biology and restoration needs, assuming CWRM staff's recommendations would follow the model used for the first eight streams.

Cox reported, "Despite repeated requests

for meetings made to both CWRM staff and the deputy chairperson in charge of CWRM, development of the CWRM plan for the remaining 19 streams proceeded without inclusion of DAR's comments or input. And, the DAR was not allowed to review or comment on the plan submitted by CWRM prior to its official posting."

Polhemus told *Environment Hawai'i* that his division got a copy of CWRM's proposal a few days before the meeting and had a mere 36 hours to prepare its own recommendations.

Cox reported that after the meeting, Thielen gave Polhemus a letter charging him with "dereliction of duty" and not meeting his employment goals, and suspended him without pay for 10 days, beginning December 28, 2009.

"One of the stated reasons was that he failed to provide stream studies and additional information to CWRM staff for in-stream flow standard development," Cox wrote.

Polhemus confirmed that Thielen gave him a 10-day suspension.

"The charge was poor communication," he said. (No one from CWRM received a similar charge.) "The first time around, we worked really closely with CWRM," he said, but that was in better times, when the staff still had a survey branch and other key positions. But with the furloughs and the loss of the survey branch, the collaboration

the second time around wasn't as close.

"There were reasons on both sides," he said. "At the end, we were not given a chance to review the submittal [before it was completed]."

"We looked at it and essentially it was a 'no action' alternative," he continued. Given the fact that Alexander & Baldwin was seeking a 30-year lease, no action on those streams would mean another 30 years of dewatering, which didn't comport with DAR's mission to protect aquatic life, he said.

What's Next?

Since the commission's December meeting, DAR and CWRM staff have been meeting, and, Polhemus said, his own staff has been working diligently to meet the commission's requests.

The division has incorporated seasonality into its modeling and created a GIS-based model of available habitat in environments, which will start to look at water needs from the bottom of the stream up.

"If the bottom is dry, it doesn't get you much," he said.

As of press time, the March Water Commission meeting had not been scheduled. Polhemus said the fact that the Legislature is in session could delay things.

With regard to the status of the eight streams the commission already dealt with,



For Further Reading

Environment Hawai'i has given extensive coverage to East Maui water issues over the years. For more background, see the following, all of which are available on our website, www.environment-hawaii.org:

"Water Commission Amends Standards for Six Diverted East Maui Streams," and "Land Board Resumes Discussion of Diversion of East Maui Water," November 2008;

"Land Board Orders EMI to Release Water to Meet Needs of East Maui Taro Farmers," May 2007;

"Ex-Judge Says East Maui Farmers Don't Need More Water for Taro," August 2006;

"East Maui Taro Farmers May Receive Interim Relief From Water Diversion," December 2005;

"Board Talk: Land Board Favors EMI Water Diversion," March 2003;

"Board Talk: East Maui Water Dispute Heats Up with Hearing Officer's Recommendation," January 2003;

"Board Talk: Contested Case on Renewal of EMI Water Permits," July 2001;

"Battle Looms Over Waters Diverted from East Maui Streams," and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.

Polhemus said he and his staff have looked at what's been happening with implementation, which seems to be "meeting with variable success."

He said Wailuanui Stream seems to be working well biologically and culturally. Hanehoi is doing well culturally, but not so much biologically, and Honopou still has low base flows.

"Things are still not where we need to be on that system," he says. "Overall, Wailuanui is the most successful to date due to its underlying geology."

Murakami has a different take. In an email he writes that the commission staff's performance on the first eight streams "leaves a lot to be desired."

"Yes, it is understaffed and under resourced, but it doesn't help our clients when they complain about lack of water (as in Honopou) to grow taro and nothing gets done for over a year. Bottom line: the staff does not follow up on these complaints," he writes.

He adds that his office is working with the Wailuanui and Nahiku communities to get them to submit information on their potential restoration of old lo'i, and gathering and fishing practices.

"It's daunting work, which is really the burden of the CWRM to do," he said.

CWRM's Dean Uyeno agreed that his staff needs to address Honopou and said it is working with the USGS to determine flows in that stream. However, he said, once those measurements are done, restoration won't be a simple fix, since, unlike some of the other streams that just require a gate to be opened, Honopou will require a hole to be cut into concrete.

In late January, Alexander & Baldwin's board of directors issued a statement that HC&S would continue to operate through the end of the year. HC&S's Benjamin said in a press release that the company's viability "depends largely on improving sugar yields, and water is the single biggest prerequisite to doing so. Further clarity regarding HC&S's future remains dependent on both the East and West Maui water decisions," referring to the NHLC case and a contested case hearing before the commission dealing with four West Maui streams known collectively as Na Wai 'Eha.

Earthjustice attorney Isaac Moriwake, who represents the parties seeking stream restoration in that case, complained to *The Maui News* that A&B's announcement was an "outrageous" attempt to politicize the cases. "We're just trying to enforce the law and right a century-old wrong," he was quoted as saying. —**Teresa Dawson**

Budget from page 1

ing to eliminate, 4 percent comes from the DLNR. As a fraction of the department's total staff (permanent and temporary workers), the cuts proposed for the fiscal year 2011 amount to 10 percent. Total spending by the department is proposed to be reduced 5.5 percent.

The Department of Agriculture took an even bigger hit. It lost 10 percent of its budget – from \$40 million to \$36 million. And whereas it has 389.25 authorized permanent and temporary positions in the current fiscal year, it is down to 290.25 for FY 2011, a blow of more than 25 percent. To put it another way, 5 percent of the total personnel losses proposed by Lingle come from a department that employed just eight-tenths of one percent of the total number of state workers to start with. Thirty-eight of the permanent positions cut come from the staff of the Plant Pest and Disease Control program – the state's first line of defense against invasive species. It has been proposed for a reduction from 134 to 96.

Last year, the Legislature approved a two-year budget for the current year and next. The spending level for the operational budget for each of the two years is roughly \$10.5 billion, almost exactly half of which comes from the general fund. To address the state's worsening financial situation, for fiscal year 2011, Lingle is proposing cuts of \$378 million, all but \$30 million of which would be in general fund reductions.

As a percentage of the total state budget, the fraction that goes toward environmental protection is minuscule, in the best of times. The entire budgets of the departments of Land and Natural Resources and Agriculture – including many non-environmental programs, such as the DOA's Measurement Standards Branch and the DLNR's Bureau of Conveyances – together amount to less than 1.5 percent of the state's operating budget. Even if one adds in the Department of Health's environmental protection programs (excluding special and revolving funds) and the planning function of the Department of Business, Economic Development, and Tourism, the amount still comes to less than 2 percent of overall operational spending.

By contrast, under Lingle's budget revisions, DBEDT will see an increase of nearly \$50 million – or, to put it in perspective, more than the entire operational budget of the DOA and half that of the DLNR. To be fair, some \$17 million of that is simply the transfer of the Natural Energy Laboratory of Hawai'i Authority (NELHA) back to

DBEDT from the Department of Accounting and General Services. (In 2009, contrary to Lingle's wishes, the Legislature moved NELHA to DAGS from DBEDT. Her supplemental budget for 2011 puts NELHA back under DBEDT's umbrella.) Also, DBEDT is anticipating the receipt of \$26.5 million in federal stimulus fund not included in the 2011 budget passed by the Legislature.

Environmental Losses

Department-wide figures do not always give an accurate picture of the losses, since many of the programs within the DLNR and DOA, to say nothing of Health and DBEDT, do not directly address environmental quality issues.

Within the DLNR, the following programs are proposed for some dramatic curbs in authorized staff levels:

- State Parks, 19 permanent positions lost, or 15 percent (from 128 to 109);
- Division of Forestry and Wildlife, seven, or 5 percent (from 146 to 139);
- State Commission on Water Resource Management, four of 24, or 16 percent;
- Conservation and Resources Enforcement, of 144 permanent posts, eight lost, or 5.5 percent.

By the DLNR's own accounting, the environmental protection component of its budget under Lingle's plan will lose \$2 million from the previously authorized spending level of nearly \$40 million. Programs the DLNR categorizes as dealing with culture and recreation are proposed for cuts of nearly 10 percent, from roughly \$38 million to \$34.5 million.

A substantial fraction of the DLNR's budget – around 17 percent – comes from the federal government, which underwrites much of the department's work to protect endangered species. As a result of the cutbacks, the state is losing funds that are required to match some of the federal dollars. Altogether, nearly half a million dollars in federal funds to the DLNR will be lost under Lingle's plan.

The Department of Agriculture's quarantine program plays a vital role as gatekeeper in protecting the state against the introduction, deliberate or accidental, of potentially invasive species of plants and animals. Yet the permanent staffing for this branch is proposed to be slashed by 28 percent – from 109 positions to 79. This is in addition to 24 furlough days in FY 2011 for the remaining staff.

The DOA's pesticides branch is another program that plays an important role in

protecting environmental quality. This is the branch that ensures that pesticide applicators are properly trained and qualified and that stores do not sell unregistered products. Its total budget for 2010 was just over \$2 million. Yet this program is proposed for a cut of 28 percent in its permanent personnel – from 21 to 16.

Health in Question

The Department of Health has responsibility for pollution control, administering federal programs such as the Clean Air Act and Clean Water Act, and overseeing management of solid and hazardous waste and Superfund sites. The state Office of Environmental Quality Control is housed within the department as well. It is responsible for ensuring that the state's environmental disclosure law, Chapter 343, is observed by other government agencies as well as private developers. Other functions that have a direct bearing on environmental quality include the state laboratory and the vector control branch.

The OEQC has not lost any staff to the Lingle cuts this year – probably because, with just five positions, it had already been pared to the bone. However, as thin as its staff is, the OEQC will experience furlough days that result in a savings of just over \$27,000 in its budget of \$343,089.

Proposed cuts to the budget of the environmental health administration include a loss of five permanent positions (from 44 previously authorized) and savings from furlough days of nearly \$200,000. According to the DOH, the cuts will affect the department's ability to respond to environmental hazards, while its capability to respond to oil spills and hazardous materials incidents will be halved. In addition, "land

use coordination and comments for development documents will be delayed and there will be an absence of state funded planning and legislative functions due to abolishment of positions."

Environmental health services will suffer a loss of 39 positions (from 152, or 26 percent), and a reduction in operating funds of \$2 million, to \$6.8 million. All but three of the positions cut will be taken from the Vector Control Branch. The DOH writes: "It is expected that ... vector-borne illness may increase due to major reductions in staff and resources related to the 36 positions" lost. Not just humans will suffer; many of the same animals that carry human diseases transmit diseases to Hawai'i's native animals as well.

The state laboratory also comes in for reductions – 10 permanent staff, and \$824,000. Already, the DOH narrative states, "cuts impeded or prevented testing and quality management required by federal Clean Air and the federal Clean Water Act.... Anticipate degradation of capabilities, capacity and quality of the state Laboratory Services program, which provides chemical and microbiological support services to the Department of Health's environmental and disease control programs, other state agencies and the public."

Then there is the DOH's environmental management program, which includes all of its major environmental control programs relating to clean air and water, wastewater, drinking water, and solid and hazardous waste. Altogether, this program comes in for a 10 percent cut in its personnel (from 218 to 196). The loss of seven positions in the Clean Water Branch, says the DOH, "will result in the suspension of, or extremely reduced sampling of O'ahu's beaches for water quality."

Other staff reductions will cause delays in the processing of permits to discharge into streams and the ocean – a factor that may be expected to dramatically impair the ability of construction projects associated with federal stimulus money to move forward in timely fashion. And as counties strive to expand their solid waste facilities, the DOH says, the reduction in staff at the Solid and Hazardous Waste Branch "will have significant delays in the review, approval, and inspections of solid waste facilities throughout the state."

In total, the DOH's environmental programs are proposed to be reduced from an authorized level of 501 permanent full-time staff to 425, for a cut of 15 percent.

Cuts in Planning

Two agencies within the Department of Business, Economic Development, and Tourism are charged with carrying out Hawai'i's land use law, Chapter 205. They are the Office of Planning, which includes the state component of the federal Coastal Zone Management program, and the Land Use Commission. Under Lingle's proposed budget, the planning office's permanent staff would be cut by five positions – from 20 to 15 – while it would also lose a temporary full-time worker. The LUC staff would be cut by one – from 6 to 5.

DBEDT also manages the state's energy program, which is about the only environmental area to have escaped the Lingle hatchet. That program, housed within the strategic industries branch of the department, would actually see general-funded personnel grow: Lingle is proposing to transfer five positions paid with federal funds to the general fund column, since the federal funds are expected to be depleted in 2011.

— *Patricia Tummons*

Some Progress Is Reported at Site In Kohala That Won Reprieve from LUC

After a year of ups and downs, work on a development near Puako, Hawai'i, finally seems to be getting under way, some two decades after the project was first proposed to the state Land Use Commission.

As reported in the October edition of *Environment Hawai'i*, the developer – now an entity called DW 'Aina Le'a – was given until March 31 of this year to complete construction of at least 16 affordable housing units, of the 385 required. Last August,

when the LUC voted to rescind its earlier order that revoked the Urban designation of the land, the Hawai'i County planning director, Bobby Jean Leithead Todd, put the odds of success at 85-15. Given the county's ability to push things along through expedited permitting, Leithead Todd might be compared to a gambler with loaded dice.

Since the LUC action, Leithead Todd has informed the developer that no envi-

ronmental assessment or environmental impact statement will be required for the connection of the subdivision roadway to the state's Queen Ka'ahumanu Highway. In a letter to the developer's planning consultant, Sidney Fuke, Leithead Todd wrote, on August 29 (two days after the LUC vote), that, "with the passage of Act 087 relating to Environmental Impact Statements on June 3, 2009, we are now able to declare the construction of a channelized intersection at the project's access intersection with the Queen Ka'ahumanu Highway is declared exempt from the requirements of Chapter 343, HRS," the state's environmental policy law. Leithead Todd went on to quote from the act, which states



that “any primary action that requires a permit or approval that is not subject to a discretionary consent and that involves a secondary action that is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway shall be exempt from this chapter.”

That must have been a huge relief to Fuke and his clients. In a letter dated February 19, 2009, Fuke had expressed concerns about the timetable for construction of the intersection improvements required as part of the LUC redistricting and which were also made a part of the County Council ordinance giving appropriate zoning to the 3,000 acres on which the full development is to be built. The rezoning ordinance states that “prior to final subdivision approval of any increment gaining access” from the intersection, “interim intersection improvements, including full channelization of the northern and southern access road intersections with Queen Ka’ahumanu Highway, shall be constructed” to satisfy state Department of Transportation requirements.

Fuke carefully parsed the language in his letter to Leithead Todd. “While the aforementioned condition requires the channelized intersection be completed ‘prior to final subdivision approval,’ the proposed affordable multiple-family residential project is not a residential subdivision” (emphasis in original). Also, Fuke said, the state DOT has generally deferred to the county on when to exempt projects from Chapter 343 compliance. “Pursuant to the above, we respectfully request your determination that said improvements within the existing right-of-way is [sic] exempt from the need for an Environmental Assessment.”

Yet it is not clear whether the state DOT is on board with the exemption. In the county Planning Department files are two identical forms, one dated April 20 and the other May 11, 2009, from Stanley Tamura, the Hawai'i District engineer for the DOT, reiterating his agency's position on the intersection improvements. In both, Tamura states that the DOT is holding to the position expressed in a letter from Brennon Morioka, state DOT director, dated December 28, 2007. In that letter, addressed to John Baldwin, principal of Bridge 'Aina Le'a, the former developer, Morioka states that it is his understanding that a Traffic Impact Analysis Report would be prepared for the intersection improvements as part of an overall environmental impact statement. “We are an

For Further Reading

More background on the 'Aina Le'a development may be found in these articles from previous issues of *Environment Hawai'i*, available online at www.environment-hawaii.org:

“2 Decades and Counting: Golf ‘Villages’ at Puako are Still a Work in Progress,” March 2008;

“Hawai'i County Board Deals Setback to Stalled Bridge 'Aina Le'a Project,” December 2008;

“Bridge 'Aina Le'a Gets Drubbing from the Land Use Commission,” March 2009;

“After Years of Delay, LUC Revokes Entitlements for Bridge 'Aina Le'a,” June 2009;

“Commission Stays Decision to Revert Puako Land,” July 2009;

“Under New Management, 'Aina Le'a is Given Yet Another Chance by LUC,” October 2009.

interested party and look forward to receiving at least four copies of the Draft EIS,” Morioka states.

What about Wastewater?

But while DW 'Aina Le'a may have escaped the requirement that it prepare an EA or EIS for the intersection improvements, getting out from under the onus of Chapter 343 for its sewage treatment facility may not be so easy.

That law requires that at minimum, an EA be prepared for any wastewater treatment unit that serves more than 49 units. DW 'Aina Le'a has submitted to the state Department of Health plans for construction of what it says will be the first phase of a sewage treatment plant – designed to handle about 153,000 gallons a day, which is about what will be generated by the 385 affordable and around 50 market-rate units that DW has said will be built in the initial phase of the project. Altogether, said a source at the DOH, the plant's full build-out will be sized to handle about 850,000 gallons of wastewater a day.

When asked whether an EA was being prepared for this facility, the Wastewater Branch staffer referred to the DOH's Environmental Planning office. A person there stated that the position charged with ensuring Chapter 343 compliance was now vacant as a result of staff cuts.

Progress Report

In mid-December, the county forwarded to the Land Use Commission a progress report. “DW 'Aina Le'a has done substantial work on Phase I of this project,” wrote Leithead Todd. Plan approvals for the first phase were given on November 30; grading plans for Phase I were also obtained, with 90 percent of the mass grading for the affordable component completed. Applications for building per-

mits for the affordable housing units had been prepared and submitted to the county Department of Public Works.

In other respects, too, there is apparent progress. At the August LUC meeting, Robert Wessels, the “W” in DW, testified that his company would take title to the land slated for affordable housing as soon as the LUC vote was made official. The formal document was executed by the LUC on September 24. In mid-September, Wessels told *Environment Hawai'i* that he expected the deal to close by the end of that month.

Not until December 11, however, was any transfer recorded at the Bureau of Conveyance. On that day, Bridge, DW 'Aina Le'a, and another Wessels company, Relco, agreed to transfer much of their interests in the affordable-housing parcel to 'Aina Le'a LLC, a Nevada-registered entity whose manager is listed as Relco.

Since last summer, financing for the development has been pursued in an unorthodox manner, with Singapore-based real estate agents selling off small units of “urban land” in 400 square-foot units priced at \$9,600 (in minimum blocks of 10 units). The purchasers are told they have “assured returns” of 30 percent over 30 months, since “the developer needs the title deed for the units held by you to sell the property” when the buildings are completed. Their \$96,000 purchase can at that time be resold for \$125,000.

The financing effort has been at least partly successful. The Hawai'i County real property tax office lists at least 151 different owners for the property, all with Chinese names but all having addresses in care of 'Aina Le'a. If each one bought just one block, the total amount raised through the Singapore effort comes to just under \$14.4 million.

— Patricia Tummons

Kuilima from page 1

progress on the development and has, therefore, not violated any of the conditions in the 1986 Decision and Order (D&O) requiring certain elements to be built. Most of the commissioners at the meeting also appeared to agree with KRC that the timelines for build-out projected by the earlier landowner, Kuilima Development Company (KDC), are not binding upon KRC.

Even so, the commission was clearly not happy with the status quo and may, at some point, recommend on its own that the D&O be amended to include completion deadlines. On February 4, however, it just wasn't ready to take that step.

Binding or not?

Discussion at the LUC's meeting focused on two main issues: 1) whether the representations KDC made to the LUC in 1986 regarding its schedule for completing the resort expansion and the various components in that plan were binding, and 2) whether, in accordance with administrative rules at the time, substantial progress had been made in the redistricted

"I don't think the commission had to adopt a condition that said you have to comply with representations. You don't have to do that."

— DOC attorney Greg Kugle

area within five years of the LUC's original decision.

With regard to the first, the LUC redistricting order lacks any condition requiring the project or its components to be completed according to a certain schedule, although it does include projected deadlines in its findings of fact (FOF). For example, one finding states that substantial portions of the infrastructure, as well as 315 resort condominium units, would be completed within five years of the LUC's approval (that is, by the end of 1991), and the entire expansion would be complete by 1996. Completion of Kuilima's master plan would include a variety of projects, but under the D&O's conditions, KDC was required to: 1) build hotels on property in the Urban District; 2) construct employee housing (equivalent to 10 percent of the condo units); 3) improve Kamehameha Highway; 4) develop water sources and infrastructure; 5) improve Punaho'olapa Marsh; 6) protect archeological sites; 7) provide public access and parking and dedication of a city park; 8) construct a sewage treatment plant; and 9) monitor coastal resources.

The DOC's attorney, Greg Kugle, has argued that the administrative rules in effect



Kuilima resort development area (outlined in white)

in 1986 required the developer to make substantial progress in the redistricted area "within a period specified by the commission not to exceed five years from the date of approval of the boundary change."

What's more, Kugle has argued, state law and the LUC's current administrative rules

say that when deciding whether to issue an order to show cause, the commission must consider the representations and commitments made in the boundary amendment petition.

Kuilima's attorneys have countered that KDC only offered projected — not firm — completion dates and that current rules regarding representations did not exist in 1986 and cannot be applied retroactively. Therefore, they argue, the LUC's decision and order contains no enforceable time limit.

But at the commission's meeting last month, Kugle argued that if the developers have eternity to meet the conditions, those conditions don't really exist. The representations included in the findings of fact are therefore enforceable, he said. Should the LUC reject DOC's request and decide to adopt an alternative recommendation by the state Office of Planning to amend the decision to include deadlines, Kugle added, the LUC might want to also consider adding standards concerning the developer's financial ability to perform, and to revisit the conditions regarding affordable housing and burial treatment.

According to Kuilima attorney Ben

Matsubara, there is no reason for the LUC to issue an order to show cause or to amend the decision because the KRC is in compliance and the decision is legally sound. While KDC clearly made statements about when the project would be complete — "the transcript is the transcript, what happened happened" — he said that the LUC cannot enforce conditions that aren't expressly stated. The decision and order mentions that development must progress and that certain things need to be started, but the conditions don't require hotels or anything else to be finished by date certain, he told the commission.

'Substantial Progress'

The commission's rules in 1986 allowed the LUC to impose some kind of time frame on development, but only in regard to the area redistricted, Matsubara argued. What's more, the rule, Hawai'i Administrative Rule 6-3, only required Kuilima to make substantial progress in the development of the area redistricted, within a commission-imposed time frame not to exceed five years.

"Not 'substantial completion,' not 'finalize all your development.' You just have to substantially progress development within a five-year time frame," he said.

He added that commissioners in 1986 knew they did not have any jurisdiction over the development timeline outside the petition area and therefore chose not to impose any deadlines in those areas.

"While it may not be a perfect Decision and Order, it is definitely not defective or flawed and no modification...is required," he said.

Matsubara pointed out that, within five years of the LUC's decision, KDC started infrastructure improvements, applied for permits for its wastewater treatment plant, began

well construction, and completed the 18-hole Palmer golf course, among other things. This, he said, meets the burden of rule 6-3.

Commissioner Lezy asked what, among the things that KDC had said would be done in the 236 acres subject to the redistricting, had not been accomplished. Kuilima manager Stanford Carr responded by pointing out that the Palmer golf course and the Punaho'olapa Marsh cover more than 50 percent of the redistricted area. He acknowledged, however, that the proposed equestrian center, 96 acres of resort condominiums, and two parks have not been done, although one of the parks has received tentative subdivision approval. Carr added that he expected Kuilima would receive final subdivision approval from the city sometime this spring.

Lezy then asked Mastubara to explain how the golf course and marsh improvements constitute substantial progress, when the condo units — something Lezy said he considered to be the “primary components” of the development plan for the redistricted area — have not even been started.

“If there was a ‘substantial completion’ wording in there, I would agree with you... [but] the key term is ‘substantial progress,’” Matsubara said. He reiterated his position that the fact that work already done covers more than half the area counts as “substantial progress,” and that there is no requirement in the decision and order that anything has to be completed.

“Wouldn't you agree with me, though, that the anticipation would be that once a petitioner makes substantial progress, that then should lead to completion?” Lezy asked.

“That could be argued,” Matsubara conceded, but he added that a lot of developments are affected by the market and that as long as a developer is making progress, that should be good enough.

When asked by commissioner Chock to define substantial progress, Matsubara said he didn't have a legal definition, although at one point he stated that “substantial compliance” referred to infrastructure. In any case, Matsubara said, “the petition area...has much of the needed infrastructure and I think...we've progressed enough to contest any reversion.” He added that the golf course alone cost more than \$20 million and Carr said about \$10 million in engineering work has been done for parkway roads.

Kugle, however, argued that substantial progress, according to rule 6-3, refers “to the new use approved,” which in this case includes a golf course, 1,000 resort condo units, a public beach park, a private park, and a stable. “Of those new uses, they have a golf course, no condos, no parks, no stable. I would say of the

five new uses [approved], they've got one....The public benefits that were so important — the parks and affordable housing — don't exist,” he said.

Addressing the apparent concerns about completion, Carr said that while current entitlements allow Kuilima to build 1,000 condo units, they may not all be built. He said that Kuilima would build what the market desires, which, for the petition area, may be single-family units at 2.5 units per acre, as opposed to 12 units per acre, which he said would be allowed on 96 acres.

“So it's highly possible you won't be developing according to the representations you made back then?” commissioner Duane Kanuha asked.

No, Carr said. The uses would be the same, but the density may change. He explained that many local resorts have not built to the maximum density allowed by their entitlements. For example, the Mauna Lani resort on the Big Island was allowed to build four hotels and built just two, he said.

“Sometimes less is much more desirable. Obviously the market has to support what you're building....No matter what the future is here, any time we build on any one parcel, we will be taking it through a process with the [City and County of Honolulu] Department of Planning and Permitting, which will require us to... address concerns,” he said.

Proposed Modifications

When the Defend O'ahu Coalition first filed its motion with the LUC for an order to show cause, the state Office of Planning (OP) recommended denial, and instead urged the commission to amend the decision and order to include development deadlines. When the LUC discussed Kuilima last year, several commissioners seemed interested in the OP's recommendation, but deferred taking action without further legal counsel.

At the LUC's February meeting, the city Department of Planning and Permitting's Don Kitaoka discouraged the LUC from adopting any calendar deadlines on the expansion because some of the project's timing depends on the city's ability to process various applications.

Even so, OP executive director Abbey Seth Mayer argued that it would be appropriate to include some kind of development timeline in the D&O. In addition to requiring a developer to make substantial progress in the redistricted area within five years, Mayer pointed out, HAR 6-3 also allowed the commission to reclassify the land “upon failure to perform within the specified period according to representations made to the commission.”

“Kuilima tried to discount the value of the

representations made, but clearly there is reference to representation,” Mayer said. However, he continued, it was unclear to him what the term “specified period” referred to.

“Does the term...refer back to five years or does it refer to the specified period in the representations or does it refer to the specified period that's explicitly given in the conditions? So, I think there's a lot of room to argue...the whole issue of substantial progress. I also think it would be appropriate to define substantial progress in the conditions...for the LUC then to have the foundation to take further action,” he said.

But while he advocated for inclusion of a schedule, Mayer asked for more time to work out an agreement with KRC. The OP and KRC had begun negotiations over a possible stipulated agreement for the development, but had postponed them pending a decision by the Hawai'i Supreme Court on whether the expansion's decades-old EIS is still valid.

Mayer said he felt the entitlements, “the sheer quantity of units,” seemed inappropriate today, and that this issue, among other things, could be part of an agreement between the state and KRC. “For example, in negotiations, the state can ask for accelerated timelines for public benefits, it can ask for decreasing density in certain project areas,” he said.

Mayer said a lot of the most contentious aspects of the expansion fall outside the 236 acres and the parties might discuss whether the downzoning of other sites is possible, particularly parcels around Kawela Bay.

If the parties cannot reach an agreement, then the LUC can still add a time limit or other conditions, he said. If they do agree, they would present it to the LUC for the commission's approval and adoption.

“The intent to modify [the D&O] will continue to bring the petitioner to the table,” he said, adding that despite his recommendation that the LUC deny the Defend O'ahu Coalition's motion, “the motion has been positive in that it has brought the petitioner into discussions. Now there needs to be a correct motion. The order to show cause is not. A motion to modify is.”

Kuilima's Matsubara said he agreed to negotiate with the OP, but opposed any modification of the D&O. “That being said, downzoning is something that could be discussed,” but the vehicle to implement that would have to be short of a modification, he said.

The coalition's attorney, Kugle, said he had a huge concern about what might transpire in private discussions between the OP and Kuilima. He also said he did not share Mayer's uncertainty about whether a developer was bound to perform according to its representations.

"You can't get any clearer than that," Kugle said of rule 6-3. "I don't think the commission had to adopt a condition that said you have to comply with representations. You don't have to do that. The statute says they do. The regs in effect then say they do. The regs today say they do. The Supreme Court says they do."

The Vote

The commission did not agree. After returning from an executive session to discuss legal issues, Chock made a motion to deny DOC's request; Contrades seconded the motion.

During discussion, Lezy argued that substantial progress clearly had not been made within five years of the LUC's 1986 decision.

"A critical component of the petition area played into whether or not substantial progress had been made — the resort condo units. Representations were made by the petitioner that construction would be done in two years, well within the five years provided in 6-3. I do personally believe that those representations were binding," he said.

Commissioner Kanuha said he echoed some of the comments of both Lezy and Chock, but in the end, the D&O and meeting transcripts left him uncertain about how binding the representations were.

KRC has made some strides in constructing infrastructure, but "whether or not that's enough to pass the test, I'm not really sure," he said.

Kanuha said he was inclined to support Chock's motion, but added that more needed to be done to clarify what standards apply to the petition area, including "a solid time frame so there's no ambiguity." Chock agreed that more discussion was needed to bring a stronger sense of closure to this issue and added that DOC's participation in any discussions between the OP and KRC was crucial.

Lezy interjected that if the coalition's motion were denied, KRC would have no reason to continue discussions. He added that with regard to the commission's desire to set a time limitation on completion, "frankly, [KRC] made it quite clear that they have no desire to modify."

Contrades then assured Lezy that should momentum halt, he would make a motion to amend the D&O himself. "We might even want to up the requirements if we can," he said.

Commission vice chair Wong was on the fence: He didn't feel an order to show cause would solve any problems, he said, but if nothing was done, "This could continue forever and the petitioner gets the impression that he can take the next hundred years to develop the property. I don't think that's acceptable, and there must be a mechanism

State Supreme Court Hears Arguments Over Supplemental Review of Kuilima Expansion

At the state Land Use Commission's February 4 meeting, the state Office of Planning and representatives of Kuilima Resort Company briefly discussed their recent efforts to reach some kind of agreement over how the company's proposed expansion of north O'ahu's Turtle Bay Resort should proceed.

The Office of Planning has spoken out in recent years about the need for time restrictions on the LUC's redistricting orders. The commission has been struggling with a number of cases where it granted entitlements to developers decades ago, only to have the project languish and the promised public benefits — affordable housing, and the like — never materialize as the property passes from one owner to the next. The Kuilima expansion is one of these cases.

While Kuilima Resort Company seems open to entering into some kind of agreement

to address the community's and the OP's concerns about the timing, density, and location of certain components of the expansion, it has postponed any further discussion with the OP pending the decision by the state Supreme Court on whether its EIS for the project is still valid.

When the Honolulu City Council voted in 1986 to approve a Unilateral Agreement granting development rights to KDC's predecessor, Kuilima Development Company, the council left out any completion deadlines for the proposed five new hotels, employee housing, and resort condominiums. None of those major components have been built, and when KRC revived the project in 2005, community groups challenged the company's ability to do so.

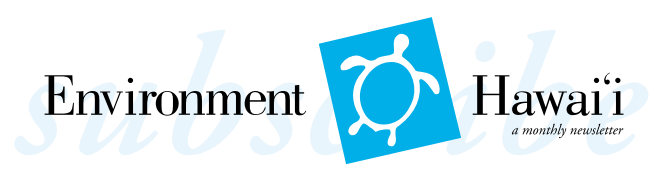
On December 17, attorneys for KRC, the City and County of Honolulu, and the community groups Keep the North Shore Coun-

for modification." Based on Contrades' commitment to make a motion to modify, if necessary, Wong called for a vote.

The vote failed 4-1-1. Predictably, when Lezy moved to approve DOC's request, no one offered a second. Contrades then moved to amend the D&O, but after an executive session, prompted by Lezy, to discuss how or

whether DOC would participate in amendment hearings, Contrades withdrew his motion.

(For more on the Kuilima development, see the June 2006, September 2008, and March 2009 issues of *Environment Hawai'i*, which are available on our website, www.environment-hawaii.org.) — **Teresa Dawson**



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try and the Sierra Club, Hawai'i Chapter presented final arguments to the Supreme Court on whether a supplemental EIS is required before KRC can proceed.

Kuilima's attorneys have argued that under administrative rules, a developer must first make a significant change in the size, scope, location, use, or timing of a project before the city can decide whether a SEIS is required. But even if any of those changes are made, Kuilima has argued, a section of the state's environmental review law, Chapter 343-5(g), conflicts with administrative rules implementing that section and, therefore, those rules are invalid.

In his argument before the court, Rory Wicks, representing parties calling for an SEIS, countered those claims, pointing out the state Environmental Council has been implementing the SEIS rules it adopted in 1985 and "in the last 24 years, the Legislature has not banned SEISes."

Justice Simeon Acoba noted that case law suggests rules can't exceed the scope of the statute. Because SEISes are not mentioned in Chapter 343, he asked, is the rule addressing an SEIS invalid?

Wick noted that the Hawai'i Environmental Protection Act is modeled after NEPA, which also doesn't mention SEISes.

Congress created a neutral body, the Council on Environmental Quality, to implement NEPA, he said, and federal regulations provide for SEISes. In Hawai'i, he continued, the Legislature gave the Environmental Council the authority to adopt rules. In Chapter 343-5(3), the Legislature gave to agencies the authority to consider previous environmental assessments and impact statements and incorporate them by reference, in determining whether a statement is required. "That

would include an SEIS," he said. "That statement is a clear indication that the Legislature intended there could be an SEIS."

When Acoba asked whether a statute of limitations applied here, Wicks said a 2006 letter from the city Department of Planning and Permitting to Defend O'ahu Coalition's Ben Schaefer, stating that the city was not going to require an SEIS, started the clock running on the statute of limitations.

"This case was filed on 120th day after that letter," he said.

Wick said a project can be "modified" if the environmental impacts have changed. A

Resort Company, said that the court's decision will affect other projects throughout the state. In this case, she said, there have been many opportunities for the public to participate, but it was not until 2005, when KRC submitted a subdivision application to the city, that anyone objected to the project. She pointed out that the city adopted the Ko'olauloa Sustainable Communities Plan in 1999, and it prominently featured the Kuilima resort expansion — 14 years after the project received its entitlements and just six before the challenge to the EIS. Also, in July 2003, Kuilima prepared an environmental

"There is no shelf life [for an EIS]."

— KRC attorney Sharon Lovejoy

key trigger is a change in intensity, which he said refers to the severity of environmental impacts. If one defines a project to include its environmental impacts, those impacts can change depending on changes in the surrounding community or circumstances, he argued.

If the court requires an SEIS, Wicks said, completing one shouldn't be too much of a time burden.

He conceded that the city didn't impose a rigid time frame on the project. "However, in every area of the law there is a rule of reason. It has been 24 years. Traffic studies only projected impacts to the year 2000," he said. According to more recent data, he said, the project will result in 2,050 more cars on Kamehameha Highway on Saturdays. What's more, he noted, federally protected turtles and monk seals are visiting Kuilima's beaches more often.

The project has likely changed in intensity as well, Wick said, noting that the original plan to build 1,500 hotel rooms and 2,000 condo units has been changed to 2,500 hotel rooms and 1,000 condos. Hotel rooms, he said, generate 2.5 times more traffic than condo units.

Sharon Lovejoy, representing Kuilima

assessment for a Special Management Area use permit for the proposed resort condos. That was a very public process that relied heavily on the old EIS, she said, adding that the EA stated that its intent was to support the 1986 master plan for the project.

"Entitlements and buildout are two different things," she said, noting that West O'ahu's Ko Olina, Kaua'i's Princeville, and Hawai'i's Mauna Lani developments were never built out to full development potential.

Lovejoy concluded that if an SEIS is required, there are no regulations to guide its preparation. She added that its impacts on the project are questionable, given that "a long, arduous fight in court" would likely follow. "The SEIS would face a number of challenges. Any DPP determination would be subject to challenge," she said.

When Justice Paula Nakayama asked how a delay of more than 20 years was not a substantial change in timing, Lovejoy responded that it was undisputed that the project was not qualified by timing.

"Is it limitless, then?" Nakayama then asked.

To which Lovejoy said, "You have to go back to what the rules actually say. There is no shelf life [for an EIS]."

— T.D.

