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When All Is Tolled

Questions over the legality and legitimacy of the 'Aina Le'a development on the western side of the Big Island have now come twice before Judge Elizabeth Strance.

The first time, she sided with the developer, finding that the state Land Use Commission had dealt with it unfairly and had violated its constitutional rights.

The second time, she looked a bit more skeptically on the claims of the developer. In the end, she determined it had tried to pull the wool over the eyes of the Hawai'i County planning director by failing to disclose an agreement that substantially changed the scope of the environmental impact statement prepared for its project.

Our cover article is one of three this month that look at controversial land development projects in Maui and Hawai'i counties. How these play out will have enormous consequences for the most fundamental pillars of the state's land use regulations.

Judge Halts Work at 'Aina Le'a And Orders Supplemental EIS

All further "development" of the troubled project known as the Villages of 'Aina Le'a has been halted as a result of an order of Judge Elizabeth Strance of the 3rd Circuit Court. Last month, Strance ruled that the County of Hawai'i Planning Department erred in accepting a final environmental impact statement for the South Kohala project and granted the county's request that it be allowed to require the developer to prepare a supplemental EIS.

As clear as the judge's words seemed to be – "All development on the project is tolled" – parties involved in the case interpreted them differently.

Randy Vitousek, the attorney for the Mauna Lani Resort Association, which brought the challenge to the EIS, said the judge's ruling stops all work at the site. (Vitousek was instructed by the judge to prepare the court order.)

Jerel Yamamoto, the attorney for the developer, told *West Hawai'i Today* reporter Erin Miller, "We intend to continue to develop the project and provide residential housing."

Bobby Jean Leithead-Todd, the county planning director who accepted the EIS in October 2010, told Miller that the judge's decision only halted work on a wastewater treatment plant (one of the two triggers requiring preparation of an EIS).

William Brilhante, attorney for defendants Hawai'i County and Leithead-Todd, was more guarded than his client. "We are awaiting the court's order," he told *Environment Hawai'i*. "Until we see the order, the county should not be making any representations regarding the disposition of the project."

Strance's decision brought to a close the lawsuit that the Mauna Lani Resort Association had brought against the county, its planning director, and the two companies most involved in the development itself, DW 'Aina Le'a Development and RELCO Corp., a Nevada company that is the managing member of DW 'Aina Le'a (DWAL). **to page 6**

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PHOTO: 'AINA LE'A FACEBOOK PAAGE

Some of the affordable housing units built at the 'Aina Le'a site.

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NEW AND NOTEWORTHY

Shearwater Deaths: In January, the state Attorney General's office asked the chief procurement officer for an exemption from the usual bidding practices. The AG was seeking to retain legal counsel to represent it in a criminal case that the U.S. Department of Justice was preparing against the state Department of Transportation over the agency's failure to take measures to protect sea turtles and migratory birds – especially wedge-tailed shearwaters.

The procurement officer approved the exemption request, which allows the Department of Attorney General to spend up to $150,000 on legal services provided by "a law firm with experience in this area."

On January 23, *Environment Hawai'i* posted news of this in the EH-Xtra column on our website. Details of the potential prosecution and of the law firm the state intended to hire were provided in a memo, written by deputy attorney general Laura Kim, that was attached to the exemption request form. Both the form and the memo were visible to anyone who wanted to view them on the state procurement office's website listing bid exemption requests.

Aaron Fujioka, chief procurement officer for the state, approved the request on January 30. Soon thereafter, the two-page memo accompanying the request was taken off the website. (A link to the memo is still available on our website, however: http://www.environment-hawaii.org.)

We sought to ask Kim why the memo was removed from the procurement office website; she had not returned our call by press time.

According to the memo, attorneys from the Department of Justice informed the state DOT that its lights are causing unlawful takes of birds, sea turtles, and moths protected by the Migratory Bird Treaty Act or the Endangered Species Act. "Although counsel for DOJ stated that the investigation is statewide, the priority is on O'ahu, where DOJ claims a considerable number of wedge-tailed shearwaters … have been supposedly injured by DOT lights," Kim's memo stated. The DOJ gave the state a choice of entering a plea agreement or facing a criminal trial.

To justify the exemption request, the AG's office noted, "The type of legal expertise required to defend the DOT is unique, as few attorneys in the United States have experience with the MBTA. The Attorney General does not develop a list to procure the services of criminal defense attorneys … as generally the state is immune from criminal liability."

The law firm that the AG's office had selected was that of Boston's Bingham McCutchen, one of the largest in the country. It "proposed a flat fee of $28,000 to conduct legal research on the constitutional defenses available to the state and to meet with the DOJ prior to indictment," the memo says. "If the DOJ should file an indictment or seek civil penalties, Bingham proposes a blended rate of $695/hour for a team of up to six attorneys, as needed."

Paintball Poison: The Department of Land and Natural Resources has obtained the state procurement officer's approval to purchase a herbicide that can target remote stands of Australian tree ferns, kahili ginger, and banana poka.

The herbicide, HBT-IMAZ, is registered for use only in the state of Hawai'i, and only on those three species of plants. What makes it even more unusual is the method of delivery: paintballs, shot from airguns by marksmen in helicopters or on the ground.

Maker of the ammo is the Nelson Paint Company, which is probably better known for its paintballs than its pesticides.

According to Lance de Silva, of the Kaua'i branch of the DLNR's Division of Forestry and Wildlife, the chemical was developed by James Leary of the University of Hawai'i's College of Tropical Agriculture and Human Resources. "He worked hand in hand with the company" – manufacturer Wilbur-Ellis – "to get it registered," and then with the paint company to design the delivery system. "It's kind of his baby," de Silva said.

Now that approvals are in hand, de Silva hopes to be able to start using the product in a few months. He won't be using it to control banana poka or kahili ginger, he said, but the paintballs are perfect for getting to Australian tree ferns in difficult-to-reach areas.

What makes it especially cost-effective, he said, is the fact that control can be done at the same time that the plants are identified. "When we do surveys for these weeds, we can actually treat them at the same time we find them, rather than having to return. We can suppress as we're doing the surveys. It's a nice, cost-efficient tool."

Quote of the Month

"We're not trying to kick the can down the road. This can's been kicked and kicked."

— William McCorriston

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LUC Finds Kihei Mega Mall, Apartments Violate Conditions of Its 1995 Order

It was a decision none of the Land Use Commissioners was eager to make.

A long silence greeted commission chair Kyle Chock when he asked for a motion on a request by Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth, and Kihei resident Daniel Kanahele that developers of the proposed Kihei "giganta mall" and a 250-unit workforce housing project be required to show why their lands in the Urban District should not revert to the Agricultural District.

The groups and Kanahele alleged that Pi'ilani Promenade North, LLC, Pi'ilani Promenade South, LLC, and Honua'ula Partners, LLC, violated conditions of the LUC's 1995 Decision and Order (D&O) granting a petition by Ka'ono'ulu Ranch to amend the district boundary around its 88-acre parcel in Kihei to accommodate a proposed 123-lot light industrial park.

Several years after the D&O was issued, the ranch sold the land to Maui Industrial Partners (MIP). MIP then sold most of the land to the Pi'ilani Promenade companies, which are subsidiaries of California's Eclipse Development Group, and to Honua'ula Partners, which is developing a residential subdivision known as Honua'ula (originally known as Wailea 670) on adjacent land.

On a small portion of the former ranch property, Honua'ula Partners plans to build 250 workforce housing units — a condition of the county zoning approval for its residential development. The Pi'ilani Promenade companies plan to develop two shopping centers encompassing a total of 700,000 square feet of retail space.

The public became aware of the drastic change in plans only early last year, around when the Pi'ilani Promenade companies received grading permits from the county and began advertising retail space.

On February 7, after hearing heartfelt testimony in support of the project from several members of the public, including unemployed construction workers desperate for jobs, the LUC voted 6-3 on a motion that it find the companies had violated conditions of the D&O regarding compliance with representations made to the LUC, the construction of a frontage road, and annual reporting requirements.

What the LUC will do next remains to be seen. It will likely schedule a hearing to decide whether or not to revert the land to the Agricultural District or whether the 1995 D&O should be amended. Honua'ula Partners has already indicated that it plans to seek an amendment to the D&O no later than July 31.

During oral arguments, attorneys for Pi'ilani Promenade and Honua'ula argued that the LUC had been made aware during the 1994 contested case hearing that the property could potentially be used for commercial and residential uses.

Jonathan Steiner, attorney for the Pi'ilani companies, argued that the original development plan and a market feasibility study submitted to the commission included commercial uses. What's more, the LUC received testimony from the petitioner's representatives that the market would ultimately determine how the property would be used, he said.

He added that there had never been an emphasis on light industrial uses.

With regard to condition No. 5 of the D&O, which required the construction of a frontage road, Steiner said the state Department of Transportation has testified that one is not necessary and that it would not approve one.

"It's not going to happen. Therefore, condition 5 hasn't been violated," Steiner argued.

Honua'ula attorney Joel Kam argued that it is not the LUC's job to approve specific projects. It only approves the land use classification.

"Since the commission doesn't approve specific projects, it makes perfect sense that [the D&O's condition No. 15] doesn't require projects to be substantially the same. It only needs to be in substantial compliance with the representations made," he said, adding that the commission must "look beyond merely the description of the proposed use. It must look at the totality of evidence, testimony, exhibits ..."

During the original contested case, the ranch's market feasibility study included a list of all possible uses in the light industrial zone.

Any prohibition on apartment or retail use must be based on the conditions of the order with "ascertainable certainty," he continued. That is something that even the county planner testified that he cannot determine, Kam said.

"If planning experts can't say with certainty what condition 15 prohibits, how is Honua'ula and Pi'ilani supposed to figure it out by themselves?" he asked.

Maui County corporation counsel Michael Hopper agreed. He noted that the original marketing study noted that M1 (light industrial) zoning — which allows both retail and apartment uses — would be best for the land. He added that the Maui Mall in Kahului, the Queen Ka'ahumanu Center, and the Lahaina Gateway were all built in light industrial zones and apartments are routinely located in light industrial areas.

Furthermore, the county never placed any limitations on retail use of the Kihei property, so "it would be improper [for the LUC] to add such a condition when neither the county commission nor the council imposed one," he said.

To state deputy attorney general Bryan Yee, who represents the Office of Planning, the representations made by the ranch to the LUC regarding the proposed number of lots, their size, and traffic impacts, among other things, "are of fundamental importance."

The proposal to build a 123-lot industrial

PHOTO: ECLIPSE DEVELOPMENT GROUP

An artist's rendering of the proposed Maui Outlets retail development.

Appeal of 'Ohi'a Forest Subdivision Invokes Kona CDP, County Public Trust Obligation

What force and effect should be given to the community development plans that the Hawai'i County Council has adopted in recent years?

That question is at the heart of a lawsuit being heard in 3rd Circuit Court, which challenges a county Board of Appeals decision that upheld the planning director's approval of a subdivision in a near-pristine 'ohi'a forest. At a hearing before Judge Ronald Ibarra in January, county attorneys stated their position clearly: the plans are only advisory and the planning director has broad discretion to disregard them.

Michael Matsukawa is representing landowners Patricia and Richard Missler, who are challenging the planning director's decision to approve the residential subdivision on land in the South Kona ahupua'a of Waikaku'u. In his argument to the court, he staked out a position diametrically opposed to the county's. It was his contention that the planning director and the Board of Appeals, which upheld the director's decision last year, were bound to make sure the results of their actions were consistent with the Kona CDP, approved by the County Council in 2008.

"This case is about legislative power," Matsukawa stated in the January 17 court hearing. "Executive officials from the county are trying to limit or modify these expressions of legislative power… The question to the court is, can they do so?"

In her argument to the court, however, deputy corporation counsel Amy Self, representing planning director Bobby Jean Leithead-Todd, maintained that the Kona Community Development Plan was hortatory only and did not require the planning director to ensure that the permits she issued furthered the goals set forth in the CDP.

In passing four CDPs in quick succession, Self suggested, "this got out of control," with the County Council caught up in the euphoria of adopting plans with incentives it could not possibly afford. "We had money back then," she said. "Unfortunately that's not the case now. Today, all four [CDPs] have to share the same pot of money, and a lot of these incentives involve money."

In any event, she continued, "the Kona

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park was the essential fact that the commission used to evaluate the impact of the project, he said. "Petitioners cannot avoid the requirement to substantially comply with representations by characterizing the proposed use as conceptual," Yee said. He pointed out that the commission's rules require petitioners to represent what the proposed use will be.

"The description of hypothetical uses [laid out in the market feasibility study] is not a substitute for the proposed impacts in the proposed petition area. There is a big difference between what can be done and what the petitioner represented ... would be done," he said.

"At no time did the petitioner analyze impacts of all uses allowed [under M1 zoning]," he continued. If the current petitioners are arguing that mere knowledge that apartment uses are allowed in the light industrial district is sufficient, then the original petition was in violation for failing to analyze all impacts of the project, Yee argued.

"The OP and LUC expend a great amount of resources analyzing impacts based on the proposed use. One cannot trivialize representations," he said.

Regarding the argument that the D&O's condition No. 5 had not been violated because the DOT now believes a frontage road is no longer appropriate, Yee said the road is still a requirement of the redistricting and suggested that the landowners should have sought an amendment from the LUC.

Yee also argued that the ranch had excluded residential uses in its original proposal. Had residential use been proposed, the state Department of Education would have asked for a condition to address any impacts, he said. The original traffic impact assessment report and market study also did not look at impacts of residential use, and neither did the LUC, Yee said.

"The non-compliance lies in no substantive light industrial use," Yee concluded. "Retailers like Home Depot do many things. They are retail in nature, but not part of the light industrial subdivision as proposed in 1994."

Yee said he wasn't going to quibble over what percentage of light industrial use versus retail/apartment use would be appropriate. "A reasonable commissioner would believe that at least 50 percent of the project would be light industrial," he said.

Tom Pierce, attorney for the intervenors in this case, argued that Pi'ilani Promenande North and South and Honua'ula have been "taking a risk that this would work out in their favor."

The traffic impacts of the new developments are likely to be five times greater than what was expected from the light industrial park, he said.

Under questioning by commissioner Ronald Heller, developer's consultant and former LUC member Charles Jencks admitted that the internal roads planned for the development would not be turned over to the county, as is required by the 1995 D&O.

Commissioner Chad MacDonald asked Jencks whether he thought the revised development plans, finalized in 2005, should have been brought to the LUC for a cursory review. Revised site maps were never included in any annual reports.

Jencks replied that based on the property's zoning and the D&O conditions, he felt the projects were "approvable" because the plan follows the existing large lot subdivision.

The majority of the commission disagreed.

MacDonald made a motion to find that the Pi'ilani companies and Honua'ula violated conditions No. 5 and 15 of the D&O. Commissioner Nicholas Teves seconded the motion with an amendment that condition No. 17, regarding annual reports, had also been violated.

Before voting on the motion, Heller explained that the LUC needs to look at impacts of a project from a variety of perspectives before it decides to amend a district boundary. "We have to do that based on some understanding of what the project is. If it could be anything from an apartment complex to a shopping mall, we can't analyze impacts in a meaningful way," he said.

"If anything [allowed] in the zoning is fair game, our job will not only be harder, but it will lead to denials," added commissioner Lance Inouye. "As I stated several months ago, I want this project to move forward, but we have to take steps."

When it came time to vote, only Chock and commissioners Thomas Contrades and Sheldon Biga opposed the motion. **— *T.D.***

CDP doesn't state that applications for Planned Unit Developments are prohibited." The subdivision at issue in this case would be done under color of a PUD: this allows lots smaller than what is called for under county zoning to be clustered in one area of a large parcel, while keeping the bulk of the parcel undeveloped.

In the case at issue, the landowners – Malama Investments, LLC, and Loren and Mary Saxton – are wanting to develop 13 lots, each about two acres, on the mauka portion of the 72 acres they own while leaving a 40-acre bulk lot undeveloped. The land, which is within the state Agricultural District, is zoned by the county for minimum five-acre ag lots. Any house that is built must be a "farm dwelling" and, in keeping with Ibarra's decision in the Hokuli'a case, there should be an agricultural plan for the subdivision as well.

But, Matsukawa noted, in the decisions of the planning director and the Board of Appeals, "there's silence as to the agricultural plan. This is styled as an agricultural PUD. Well, where's the agricultural plan? It's like Hokuli'a revisited."

> *"Let's call it what it is – a residential subdivision. And they want to cut it out of the heart of the forest."* ***— Mike Matsukawa***

(In the Hokuli'a case, Ibarra ruled that the gated, golf-course-centered residential subdivision was not a farm enterprise. In the wake of that decision, development of primarily residential large-lot subdivisions on land in the state Agricultural District has been made much more difficult, although it has not ceased entirely.)

"Let's call it what it is – a residential subdivision," Matsukawa said. "And they want to cut it out of the heart of the forest, since that's where the 60-inch rainfall exists. They want that, because they don't have county water." Since any houses built on the lots to be developed under the permit would not be served by the county water system, and the developer is not planning to drill a well to provide water, the houses need to be placed in that part of the larger lot where average annual rainfall is at least 60 inches; below that amount, the county may not approve residential developments relying on water catchment systems.

In a brief filed with the court, Self pushed the argument against the Kona CDP's enforceability even further. The ordinance that the County Council approved in adopting the plan was defective since, she wrote, it "failed to even mention the Zoning or Subdivision Codes" and thus "could not legally amend" them. "Because the KCDP was adopted as a plan without proper notice of its regulatory nature in its title, its body, or by providing the public with actual notice, the Appellants' KCDP-related claims must fail," she continued.

Matsukawa disputed the view that the ordinance itself was defective. The court, he argued, "should note that the planning director did not present this argument to the Board of Appeals," and so the county should not be allowed to raise the issue now. Further, he wrote in a reply brief, Self's own department, the county Office of Corporation Counsel, approved the Kona CDP bill "as to form and legality" at the time it came before the County Council. "[T]his court should estop all county officials from 'blowing hot and cold' on this point," he wrote.

Natural Resources Trusts

Matsukawa raised numerous other points on appeal, including the claim that the approval of the subdivision violates the "Public Natural Resources Trust."

"Planning officials must enforce this constitutional trust when they process a development-related permit," Matsukawa argued in a brief, citing the Supreme Court decision that upheld a ruling of Ibarra's in a case brought over pollution of Kealakekua Bay by runoff from Hokuli'a. (In that case, the county had argued that it had no such public trust obligation. The Supreme Court disagreed, finding that the state Constitution "mandates that the county does have an obligation to conserve and protect the state's natural resources.)

Were that not enough, Matsukawa noted, "Hawai'i County voters also adopted a charter-based 'natural and cultural resources' trust."

Public trust resources that have been jeopardized by the county's actions, Matsukawa wrote, include the native forest, historic sites, and the watershed values on the Saxtons' land.

Ibarra asked Self about the public trust issues involved. "You've argued that it doesn't apply here because it's private land," Ibarra noted, going on to ask her specifically about the designation of the area as a Priority 1 watershed by the state.

"As far as we know, there's no source of water" on the land, Self replied. "Also, the [state] Water Commission… they are charged with protecting watersheds."

Ibarra: "So to apply the public trust doctrine, there would need to be a finding that the watershed is a public resource, and you argue that it does not fall under the public trust doctrine because a watershed on private property is not a public trust."

Self hedged a bit. "Watersheds can be a public trust," she said. "Even the Misslers' property is on the same watershed. And they have a lot more houses in that subdivision."

The state Water Code, she went on to say, "set up this commission and even a fund, so that if there's … a sensitive area, and they think there's going to be problems with any activity that is proposed, they can condemn that property and purchase it in order to protect the watershed." (At no time since its establishment more than two decades ago has the state Commission on Water Resource Management condemned property for any reason. Nor, contrary to Self's claim, does it have any fund that would allow it to do so.)

In any event, Self claimed, because plans are not final, any claim of damage to the public trust resources would be premature. "So the problem is, how do we know that anything they do is going to destroy the watershed or hurt" public trust resources, she asked.

Ibarra had not issued a ruling in the case by press time. ***— Patricia Tummons***

For Further Reading

Our June 2012 cover story deals extensively with the PUD permit and the Board of Appeals deliberations, "A Subdivision in an 'Ohi'a Forest Gets OK From Hawai'i Planning Director."

PHOTO: RICHARD AND PATRICIA MISSLER

Old-growth 'ohi'a forest at Waikaku'u, South Kona.

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The County's Evolving Stand

Throughout most of the court proceedings over the last two years, there had been little air between the position staked out by Brilhante of the Corporation Counsel's office and that taken by DWAL and RELCO, represented by Yamamoto.

By the February hearing, however, it was apparent that the county had come around to the position of the plaintiff.

At issue before Strance were competing motions — one for summary judgment, filed by the MLRA, and a motion for remand, filed by the county. The plaintiff's motion sought to have the EIS process begin anew. The county's motion asked the court to give the county another shot at reviewing the EIS, allowing it to then determine whether it should ask the developer to prepare a new EIS, a supplemental EIS, or nothing more at all.

But in the two months since the county's motion for remand judgment had been filed, the county's position had evolved further – to the point, Brilhante said, that "the Planning Department will be requesting from the applicant that a supplemental environmental impact statement be submitted." The supplemental EIS will have to look at plans for developing the 3,000 acres that were identified in the EIS preparation notice (EISPN) of 2007, and not just the 1,000 or so acres in the Urban land use district that DWAL has agreed to purchase and develop from landowner Bridge 'Aina Le'a. (Bridge had published the original EISPN, but the EIS itself had been prepared by DWAL, a fact that was one of the points of contention in the lawsuit.) As provided for in state rules, the new document will be subject to the same public notice and comment period that any EIS must undergo.

Prompting the change in the county's position was the disclosure of a Joint Development Agreement between DWAL and Bridge 'Aina Le'a. The existence of the JDA had been referenced in a document – a purchase and sale agreement between DWAL and Bridge – that had been appended to the EIS. However, the JDA itself was omitted from the EIS and was not even provided to the county until December 2012. According to Brilhante, the omission was intentional and it was an "oversight" on the part of the county not to request this before it accepted the final EIS.

"I'd be the first to state that the joint development agreement should have been looked at," Brilhante told the court at last month's hearing. "That's what raised my concern, and it was the impetus … for filing the motion for remand."

The JDA

In late January, *Environment Hawai'i* received the JDA from Brilhante through a formal Uniform Information Practices Act request. That agreement took effect on December 11, 2009, well before release of the draft EIS in May 2010. It clearly states that the "Villages at 'Aina Le'a is a master planned community … to be developed on lands totaling approximately 3,000 acres" – and not merely the 1,000 that were the subject of the EIS.

The agreement obligates DW 'Aina Le'a to design the sewage treatment plant to accommodate "the anticipated uses of the Agricultural land." The water system is also to be developed to serve developments in both the Urban and Agricultural lands.

The JDA also binds both parties to cooperate in the "coordinated development of the project," including the "location, planning, development, construction, operation, administration, maintenance, repair, and use" of improvements that will benefit both the Urban and Agricultural lands, such as potable and non-potable water supplies, sewage treatment, electric and other utilities, roadways, and access to the property.

> *"They're not being entirely honest with the court. We've proved that now, and the county has accepted it."*
>
> ***— Randy Vitousek***

The terms of the agreement cast an unfavorable light on many of the claims made by DWAL and the county itself in earlier motions to the court and in DWAL's response to the resort association's comments on the draft EIS – a fact that Vitousek took pains to point out to Strance.

In its July 2010 comment letter on the draft EIS, Vitousek noted, the resort association had asserted that the project "is a portion of a larger project, the project that was the subject of the EIS preparation notice."

"DW's response to that was the first of several misrepresentations by DW as to the scope of the project and the content of the joint development agreement," he continued. " 'It's not part of a larger project… the draft EIS is not intended to support any permits or approvals that may be required for the development of the Ag lot.' They made an affirmative representation that what is considered in the draft EIS will not provide infrastructure for the remainder of the Ag land. That is a direct misrepresentation of the content of the Joint Development Agreement…."

"The applicant, DW 'Aina Le'a, has consistently misrepresented to the county and to the court the actual content of the JDA and even after it was pointed out to the county … that this JDA existed, they refused to produce it until only very recently, and they continued to argue it was irrelevant and unnecessary…

"When the county actually got a copy of it, the county is trying to do the responsible thing, and it's trying to acknowledge it accepted DW's misrepresentations… and [now] says, in so many words, that the JDA clearly brings into question the continued or ongoing relationship between DW and Bridge.

"So the county has admitted that the scope of the EIS as represented to it by DW was not accurate, that the JDA shows DW and Bridge were cooperating in designing the infrastructure."

"What has happened here," Vitousek concluded in his statement to the court, "they changed the scope of the project. They're not being entirely honest with the court. We've proved that now, and the county has accepted it."

'Less than Candid?'

Strance then asked DWAL's attorney, Yamamoto, whether "DW [had] been less than candid with the county by failing to disclose it has joint development responsibilities or obligations to Bridge."

"I don't believe so," Yamamoto answered. "In terms of the JDA, it was never attached to the EIS, and I don't think it was ever an issue until now."

He denied that the agreement was tantamount to a partnership between Bridge and his client. "What I believe the JDA says is, if Bridge wants access to the infrastructure that goes through 'Aina Le'a's properties … they need to provide the capital to work with us and help us size it, et cetera. And at this point, there's nothing. I don't believe we are misrepresenting anything. … Bridge has not made a commitment at all."

Strance appeared skeptical. "If you have the obligation to provide access to a sewage treatment plant for their development, and you don't communicate that to the county, how does the county evaluate the cumulative impacts? … Isn't that required to be communicated to the county?"

Yamamoto agreed: "I would submit that

we would probably have a duty to disclose that to the county."

"Was it disclosed?" Strance asked.

"I cannot say," Yamamoto replied. "I don't know. I don't know."

Despite Yamamoto's admission of a possible failure to communicate with the county, Brilhante stood up for DWAL, even though it involved acknowledging an oversight on the part of his client.

"The county should have at an earlier stage requested a copy of the JDA," Brilhante told Strance. "It was hard to get. DW, as the record reflects, has been cooperative with the county… Bridge for whatever reason does not want to be engaged in this process. That's the problem we've had, both parties have had."

No Hard Look

When Strance announced her decision, she prefaced it with an acknowledgement of the difficult position Brilhante was in. "Mr. Brilhante," she said, "I can't imagine that as a corporation counsel it is an easy thing to come back into the court and say we didn't get it just right and we want to make it right. In the end, the county is well served by having attorneys that are willing to look at work that has been done by colleagues and people they have ongoing relationships with … and say to the court 'We need to stop; we want to take another look at that.'"

> *"I'd be the first to state that the joint development agreement should have been looked at."*
> ***— William Brilhante, corporation counsel***

The judge granted the resort association's motion for summary judgment "on the limited grounds that the county did not fully evaluate the relationship of Bridge and DW in the Joint Development Agreement and thereby was unable to give a hard look at either whether the project was part of a larger segment, or that it prevented the county from fully evaluating the cumulative impacts."

The court was also granting the county's motion to remand, she said, although at the same time she suggested that it should have early on taken a broader look at the whole project.

"In granting the motion for summary judgment," Strance said, "the court is not finding that the county erred in allowing the applicant to change during the course of the environmental review or even allowing the scope of the project to change … but the facts reveal in this case, in light of the purchase and sale agreement and reference to the joint development agreement in that, part of the hard look the county was required to undertake was to look at these agreements and ensure itself it was evaluating the project in its proper scope – and that simply didn't happen."

"As part of the grant for summary judgment and the grant of the motion to remand, all development on the project is tolled," she concluded.

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State Files Appeals In LUC Case

Judge Strance issued her ruling on February 12. Coincidentally, before the week was out, the state appealed an earlier ruling she had made involving the 'Aina Le'a development to the Hawai'i appellate courts and appealed a separate federal court ruling to the 9th U.S. Circuit Court of Appeals.

The first of these two appeals involves Strance's finding of December 2011 that the state Land Use Commission injured landowner Bridge 'Aina Le'a and DW 'Aina Le'a Development when, in March 2011, it ordered that the 1,060 acres (the same land covered in the 'Aina Le'a EIS) be reverted to the Agricultural District from the Urban District.

In an appeal of the LUC order brought before Strance in April 2011, Strance had found that the LUC violated the state land use law, Chapter 205 of Hawai'i Revised Statutes, in several different respects and went on to find it violated Chapter 91, relating to contested case proceedings.

What's more, she went on to find that Bridge's due process and equal protection rights under the state and federal constitutions were breached by the LUC's action. "The LUC's conduct … constitutes a denial of procedural and substantive due process of law under Article 1, Sections 5 and 20 of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution," she wrote in her decision. Bridge's and DW 'Aina Le'a's rights to equal protection under the law were violated inasmuch as the LUC treated them differently than other developers on whom similar stringent conditions were not imposed, she found. "Bridge and DW have shown that the LUC treated them in a materially, adversely different manner than other similarly situated developers, and that the LUC did so intentionally and without any rational basis for the differential treatment," she wrote.

Almost immediately, the state appealed the decision to the Intermediate Court of Appeals. The ICA determined that Strance's decision was not appealable, since it did not dispose of all claims. Strance had to amend her order twice in order for the state to finally have an order it could appeal. On February 8, Strance filed her second amended final judgment; six days later, the state filed its notice of appeal with the Intermediate Court of Appeals.

The Federal Appeal

Separate from the case heard by Strance, in June 2011 Bridge 'Aina Le'a filed a complaint in 1st Circuit Court in Honolulu against the LUC and nine commissioners. Bridge alleged that its constitutional rights had been violated and that it was owed not less than $35.7 million in damages, which it sought against not only the state, but seven of the nine commissioners as well. (Commissioners Charles Jencks and Duane Kanuha, who voted against the reversion, were sued "as nominal defendants, based upon their prior official positions as commissioners," but no monetary damages were sought against them.)

Given the nature of Bridge's claims, the lawsuit was transferred to U.S. District Court in Honolulu by the end of the month. Last March, after the state indicated it would be appealing Judge's Strance's ruling, U.S. District Judge Susan Oki Mollway ruled that all action in the federal case – including a decision on the state's motion to dismiss claims against individual commissioners – would be stayed while the state's appeal of Strance's ruling ran its course.

The state then appealed Mollway's order of a stay to the 9th Circuit Court of Appeals. In a brief on the appeal filed just last month, state deputy attorney general William Wynhoff noted that the lower court's decision to stay all action on the case consigned "the commissioners to years with the shadow of this lawsuit hanging over their heads," Wynhoff wrote in his appeal.

"The district court should have ruled … that individual commissioners are immune from personal liability and entitled to dismissal of all claims against them personally."

Bridge 'Aina Le'a also appealed Mollway's order; its brief to the appeals court is due later this month. ***— Patricia Tummons***

BOARD TALK

OHA, DLNR Reject Proposal To Sell Sand Island Property

Thanks, but no thanks.

That, basically, is the response of several divisions of the state Department of Land and Natural Resources to the recent proposal of the Sand Island Business Association to trade private lands worth about $175 million for the 70-acre industrial park it leases from the department.

"If they came in with $600 million to a billion [dollars], maybe we'd look at it," said DLNR Land Division administrator Russell Tsuji at the Board of Land and Natural Resources' January 25 meeting.

The DLNR's Sand Island Industrial Park is its largest revenue-producing asset and is the state's most concentrated industrial hub. The 113-lot park generates roughly half of the income that goes into the department's Special Land Development Fund, which is the sole source of revenue for the Land Division and the Office of Conservation and Coastal Land and which also helps support several of the department's other divisions and the Commission on Water Resource Management.

But, faced with having to pay market rent in a few years, SIBA wants out of its 55-year lease, which expires in July 2047. Since 2009, the association has pushed for legislation that would force the DLNR to sell the land so that it, and its tenants, can keep the $60 million worth of infrastructure improvements they've put in. They've also argued that the lease's rental reopenings every 10 years make it difficult for tenants to secure financing for additional improvements.

To accommodate SIBA and its sublessees, the 2011 Legislature passed Act 235, which allows the Land Board to consider the sale or exchange of the industrial park's lots to SIBA tenants. An appraisal last May determined that the market value of the land is about $175 million.

On January 25, Tsuji asked the Land Board for its input, while making it clear he wasn't interested in letting go of the lands for anywhere near that sum. Tsuji noted that the department initially granted the long-term lease — and gave SIBA a significant break on rent for the first 25 years — in exchange for infrastructure improvements. (Under the lease, SIBA was supposed to have dedicated the roads it built to the City and County of Honolulu, which it has yet to do.)

What's more, Tsuji noted in his report to the board, "to assist the SIBA tenants' financing efforts, the department agreed to conduct the rent reopening scheduled for July 1, 2017 immediately, which would result in the rent being fixed through June 30, 2027. This would result in a known rent period of 16 years, which would allow tenants to seek both short-term and long-term financing." The DLNR did this despite finding "no conclusive evidence that long-term, real estate secured financing was required by a substantial number of SIBA tenants," and that conducting the reopening early "puts the state at risk if the real estate market improves in a manner not anticipated in the appraisal," the report states.

Currently, SIBA pays $5 million a year in rent, but will start paying market rent of $8 million a year in 2017.

"This asset is very valuable for this department. It is a steady source of income," Tsuji said. In his report, he recommended that should the Land Board agree to a land exchange, "a significant premium over and above the fair market value determined by appraisal shall be included in the exchange values."

PHOTO AND MAP: DLNR

An aerial view of the lease area held by the Sand Island Business Association.

Opposition

"What will happen in the future when the cash runs out? It would be a disaster for everyone. Why sell such important revenue lands? It does not make any sense. We urge the Land Board to listen to all sides of the story, but in the end, please do the reasonable/rational thing, which is to oppose any sale so we may continue to fulfill our kuleana for the people of this great state," wrote OCCL administrator Samuel Lemmo in testimony to the board.

Lemmo was joined by the administrators for the DLNR's Engineering Division, the Division of Forestry and Wildlife, and the Water Commission in his opposition to SIBA's proposal.

Water Commission director William Tam argued that selling or exchanging the Sand Island lands, located at the entrance of Honolulu Harbor, could abridge the public trust.

"While public lands in some locations might be replaced or substituted without undue burden on the government's long- term functioning or overall public trust responsibilities, harbor lands are different. They are unique and essential to the public good. There are no 'substitute' harbor lands. That is why courts carefully scrutinize any proposed transfer of harbor-related or submerged lands — and often strike down the transfer as a violation of the state's Public Trust responsibilities," he wrote.

Tam also pointed out that some portion of the industrial park may be needed for the city's expansion of the Sand Island Wastewater Treatment Plant (WWTP). A 2010 federal consent decree requires the city to build a secondary treatment plant east of the existing WWTP.

"Some of the secondary plant will very likely require portions (or all) of various lots on the 'Ewa side of the Sand Island Industrial Park," he wrote. "If title to the land is transferred, the city may be required to turn around and condemn the very same land (at a higher

valuation) in order to build its secondary plant."

The Office of Hawaiian Affairs stated in written testimony that it would oppose any land exchange that did not provide private lands significantly more valuable than Sand Island and that did not offer an equal or greater income stream. (Currently, a number of state departments that owe OHA 20 percent of their revenue generated from ceded lands do not pay and DLNR makes up the difference, in large part, with money generated from Sand Island.)

"I personally cannot fathom the idea of selling previously submerged lands," Tsuji told the board. "I don't like selling the beach or the ocean. ... Somebody else can do it." (Sand Island is actually reclaimed land.)

A Win-Win Situation?

"I'm not in favor of entertaining this kind of thing. Why are we looking at this?" O'ahu Land Board member John Morgan asked Tsuji.

Tsuji pointed to 2011's Act 235 (which the DLNR had opposed). Although the act doesn't force the department to do anything, "I would like to put this to rest," he said.

SIBA executive director Rodney Kim, however, wanted to continue the conversation.

"We're looking for a win-win situation. ... It's not like the state is going to be losing any revenues or lands," he said. During the 2011 legislative session, Kim and several SIBA tenants testified that the sale of the industrial park would be pure profit to the state, since the land was raw and undeveloped before SIBA improved it.

Acquiring lands to exchange would be a major undertaking for SIBA, Kim told the board.

"We'd probably have to go out and find three or four parcels for an exchange. It could diversify your revenue streams," he told the board. He also pointed out that Sand Island is practically at sea level and subject to tsunami inundation.

"All I'm asking is for your approval to get this started," Kim said. "Without it, we can't sit down and talk [with landowners]."

Christine Kam, SIBA's real estate advisor, argued that the $175 million appraised value includes the significant premium Tsuji is seeking, noting that an earlier appraised value of only $97 million was used to determine the 2017 rent.

Land Board member Morgan, however, wasn't satisfied with SIBA's rationale for the sale of public land. The association may have made significant infrastructure improvements and turned what was basically a dumping ground and homeless camp into a thriving industrial center, but that was a requirement of the lease, he argued.

"Wasn't that part of the deal? They were financed by low lease rent. It was not all their risk," Morgan said.

Given the unanimous testimony against the exchange from the DLNR's divisions and the Water Commission, at-large board member Sam Gon recommended that SIBA try to persuade those offices to change their position.

"Until we get departmental buy-in, it's unlikely this board will supersede [them]. ... We take strong guidance from the staff of this department," he said.

Big Island board member Rob Pacheco disagreed.

"The board serves a function ... to look down the line strategically. There is some validity to the argument of diversifying," Pacheco said, mentioning the threat of sea level rise. Although he was interested in a deal, he said it was impossible to endorse anything without more specifics, especially since an exchange would require the DLNR to manage multiple parcels rather than a single industrial park.

Pacheco added that he wasn't clear on what SIBA wanted from the board.

Kim said he wanted the board to agree to $175 million as the value of the park, which would allow SIBA to identify potential exchange properties. Addressing Pacheco's concern about having to manage multiple properties, Kim assured him that SIBA would consider being the master lessee should an exchange go through.

Kim admitted that not all of SIBA's sublessees are capable of buying their lots, but "the willingness is there."

In any case, the current low interest rates and property values are "compelling reasons to rush this forward," Kim said, adding that a lot of the potential exchange properties SIBA had identified in 2011 are off the market now.

Pacheco asked Tsuji whether the DLNR has investigated what an appropriate premium would be. It had not, Tsuji said. When prodded further, Tsuji said he would not consider an exchange of lands with equal value, but might consider a deal that provides an equal revenue stream.

"Like my dad always told me, it never hurts to look at a deal," Pacheco told Tsuji. "I think you gotta lean on them. They're the ones who want this."

Forcing the Issue

A week and a half after the Land Board's meeting, the state Senate Committee on Water, Land, and Housing leaned on the DLNR.

On February 5, the committee amended a bill that proposed to provide funds for the Sand Island Ocean Recreational Park master plan to also require the DLNR to negotiate a land exchange with SIBA for the Sand Island Industrial Park, "to be complete on or before June 30, 2014."

Former DLNR director Laura Thielen, who sits on the committee, did not vote that day, but when the committee voted unanimously to pass the amendments on February 13, Thielen voted in favor but with reservations.

♣♣♣

West Wind Works Bows Out, Successors Downsize Project

More than half a million dollars in arrears on payments to the DLNR, West Wind Works, LLC (3W), is now backing away from its commitment to develop a mix of renewable energy facilities — which together would generate 20 megawatts of power — on 110 acres at O'ahu's Campbell Industrial Park.

3W signed a development agreement with the DLNR in 2010 for the project. But after the company missed performance deadlines and failed to make scheduled payments, the DLNR's Land Division proposed terminating the agreement last May. 3W, however, had just found a new partner in International Electric Power, LLC (IEP), and asked the board for more time to work with the Land Division on amending the development agreement.

The Land Board agreed to a deferral and by the end of the year, after submitting two unsatisfactory proposals to the Land Division, 3W and IEP had come up with a final proposal that added IEP and replaced 3W with O'ahu Renewable Energy Park, LLC (ORP), a company in which 3W has an ownership interest. Under the proposal, IEP-ORP would pay the $530,000 in back fees in four installments. The first payment would occur when the Land Board assigned the development agreement to IEP-ORP and their partners. The second would be made if and when IEP-ORP is short-listed for Hawaiian Electric Company's request for proposals for renewable energy. The third, if and when IEP signs a power purchase agreement with HECO. The final payment would occur if and when IEP-ORP secures financing and a long-term lease with the DLNR.

IEP-ORP would not be required to pay annual fees of $550,000 until the PPA was issued and financing closed, under the proposal.

In addition, the scope of the project was

much smaller. Instead of developing the entire 110-acre lot, IEP-ORP proposes building up to two 5MW biomass plants on just 17 acres.

Because so many of the payments in the proposal were contingent on events that may or may not occur, and because the proposed location of the biomass plants would interfere with the development of the rest of the lot, the Land Division recommended on January 25 that the Land Board amend the proposal to require IEP-ORP to develop the plants in another part of the lot and to post a bond covering the delinquency as well as all future payments under the agreement. The Land Division also recommended that IEP-ORP have a draft environmental assessment published by August 31 and submit a subdivision application to the City and County of Honolulu no later than January 31, 2014.

Either that, or the Land Board should terminate the agreement, a Land Division report recommended to the board.

Attorney William McCorriston, representing IEP-ORP, proposed amending the agreement rather than terminating it. He said his client agreed with the Land Division's suggested amendments, but needed time to do some due diligence on the alternative facility sites.

"We're not trying to kick the can down the road. This can's been kicked and kicked," he said. McCorriston noted that HECO's RFP was coming out soon, so the Land Board and his client needed to resolve the development agreement terms in the next 60 days.

"If we don't ... then we've missed the boat," he said. Still, he added, "sometimes the devil's in the details. We'd like to use the next 30 to 60 days to firm those details up."

At-large Land Board member David Goode seemed concerned about the project's drastic evolution.

"The 'can' keeps changing. In fairness to others who were interested, it looks like [you were] tying it up." Under the newest proposal, "we're left with one-eighth of the can. ... I just want to get this resolved," he said.

"I hear you. If I were sitting there, I would ask the same question of me," McCorriston said.

In the end, the Land Board voted to defer the matter.

Should the Land Board choose to amend the development agreement, IEP-ORP plans to supply its biomass plants with feedstock from the PVT construction and demolition landfill in West O'ahu.

IEP-ORP has a letter of intent with PVT to use its C&D debris, according Paul Shinkawa of 3W and ORP. The landfill collects 1,200 tons of construction debris a day and the plants would need 300-400 tons a day, he said.

"We plan on having a feedstock processing area, chipping PVT feedstock down to size," he told the board.

"They've [PVT] actually been pretty clever, unlike the Waimanalo Gulch landfill ... separating material" for sale, McCorriston said.

"They separate out the metals, organic materials, toxic [materials] so materials that can be reused, they know where they're located," Shinkawa added. "This type of planning helps Hawai'i and them as a business. It extends the life of the landfill. They're the only C&D landfill in the state."

♣♣♣

Board Allows Kayak Tours In Kealakekua State Park

Last month, the Land Board sidestepped its longstanding policy to put the state's natural resources first, the public second, and commercial interests third. After a month-long ban on all non-motorized vessels in Kealakekua Bay State Historical Park, the Land Board allowed the three permitted commercial kayak tour operators to return to the bay, but not the general public. Its reason: the Division of State Parks needs more time to figure out how to reintroduce non-commercial users of the bay without creating an opportunity for illegal kayak rentals. What's more, the resumption of kayak tours may reduce the number of hikers in the park, many of whom have been relieving themselves among the cultural sites throughout Ka'awaloa Flats.

In January, the DLNR banned kayaks, stand-up paddle boards, surfboards and other non-motorized vessels so that it could address the overuse of the bay, as well as various alleged illegal activities, including unpermitted kayak rentals and drug dealing. With access to the bay cut off, however, resource impacts on land increased as more visitors took to the park's hiking trails.

"We have a new archaeologist that did a very extensive survey. Four sites are being abused; toilet paper [has been found] next to the [Captain Cook] monument," State Parks assistant administrator Curt Cottrell told the board at its January 25 meeting.

Cottrell reported that his division was working toward launching a permitting website for kayak rentals this month. The division is considering establishing a maximum daily capacity of 20 to 30 rental kayaks, but is still struggling with how to prevent illegal kayak rental businesses from restarting once the bay is reopened to the general public, Cottrell said.

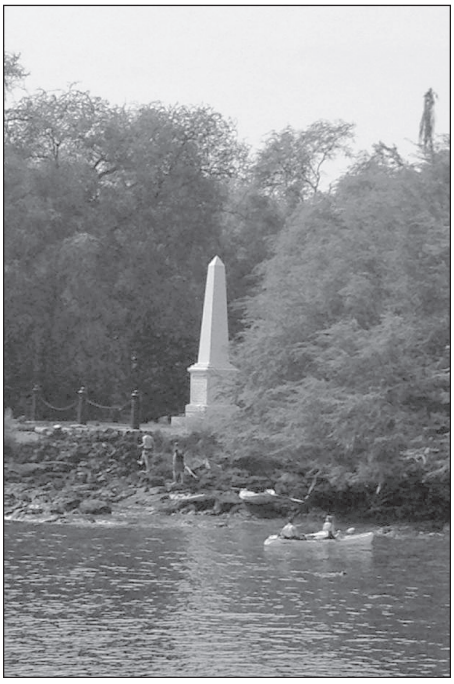

PHOTO: FACEBOOK PAGE OF YVONNE SHIMEK

Kayakers visit the Captain Cook monument at Kealakekua Bay State Historical Park.

Shortly before the closure, one area resident had counted 86 kayaks in the bay at one time, according to testimony submitted to the board.

"I've seen the department and the state struggle with these issues of demand," Big Island Land Board member Robert Pacheco said. "One of the things is, when there's a demand for a natural resource, it's very difficult to shut it off. ... People find a way to squeeze through."

Kealakekua Bay is one of those resources, he said. "This is a really compelling place. ... As a natural resource, it's a jewel."

He suggested that the department needs to have staff on site.

"We need to find the funds. ... Can you imagine if Diamond Head was managed the same way we're managing Kealakekua Bay?" he asked, adding that the DLNR and the state Legislature need to step up because the commercial pressures on the bay are not going to go away.

"If there's money on the table, people are going to be going for it," he said.

"You're right. The two options are we privatize it or we staff it up," Cottrell said. "The problem is we need the money first. We gotta do this triage first."

Last month, kayak tour permittee Iwa Kalua suggested that the DLNR relocate its enforcement division's trailer in West Hawai'i from Honokohau Harbor to Kealakekua Bay, an idea Cottrell and some Land Board members seemed to support. ***— T.D***

Study Links Miconia to Potential For High Erosion Rates in Hawai'i

One of the state's best tools against invasive species is biocontrol, according to state Department of Agiculture invasive species specialist Carol Okada. And in recent years, resource management agencies here have received approvals to release carefully selected insects to save native wiliwili trees, stamp out stinging nettle caterpillars, slow the spread of water-hogging strawberry guava, and kill fireweed, which is toxic to livestock.

But so far, no biocontrol agent has been identified for *Miconia calvescens*, considered by many to be the worst invasive plant in Pacific Island wet forests. The plant, introduced to Hawai'i island in the 1960s, has since been found on Kaua'i, Maui, and O'ahu and is controlled almost exclusively by small crews on each island armed with machetes, pesticides, and GPS devices. Herbicide ballistic technology, which involves shooting balls of herbicide at the plants from a helicopter or from on the ground, is a relatively new technique currently being explored. (Elsewhere in this issue, we report on a recently approved paintball pesticide that targets Australian tree ferns.)

PHOTO: FOREST AND KIM STARR

Miconia

Although miconia has become relatively widespread on Hawai'i island, dense stands like those in Tahiti have been confined mostly to ravines in Onomea, and manual control has been relatively successful in preventing its spread on the other islands. On O'ahu, for example, the O'ahu Invasive Species Committee found not a single miconia plant during a recent survey of previously infested areas.

Still, the article "Erosion Potenial Beneath Invasive Miconia Stands," published online earlier this year by Wiley Online Library, suggests that should the plant spread, increased soil erosion would likely follow.

The article reports the results of research conducted by a team of scientists from the University of Hawai'i's Geography Department, Japan's Forest and Forestry Product Research Institute, and the National University of Singapore.

Using lasers to measure the size of raindrops in forested areas on the island of Hawai'i, they have found that areas dominated by miconia may be more susceptible to erosion than those without the invasive plant.

In 2007, the scientists, including UH climatologist Thomas Giambelluca, measured raindrops from three rainfall events at seven sites in east Hawai'i, one of which was infested with miconia. They then calculated the kinetic energy of those drops — or their splash potential — and determined whether or not they were likely to cause erosion.

They found that the effective kinetic energy was highest at the miconia site, which "supports the notion that miconia invasion could increase the erosivity of a site by affecting throughfall raindrop properties," they state in their article.

Raindrop size at the miconia site (3-83 millimeters) was twice that of ambient rainfall (1-62 mm), they wrote. Although drop size in multi-storied 'ohi'a forests was greater than that of miconia, the drops didn't fall as far, and, therefore, didn't hit the ground as hard.

"Compared with native 'ohi'a stands, throughfall energy is greater in miconia stands because a higher proportion of large drops exceeds erosive thresholds," they wrote.

Grounds beneath miconia stands are more vulnerable to erosion because the plant's large leaves inhibit the growth of protective understory vegetation, they collect rainfall into larger drops, and they also decompose rapidly, leaving soils even more unprotected, they concluded.

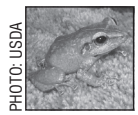

PHOTO: USDA

Coqui Control

Like miconia, the coqui frog (*Eleutherodactylus coqui*) has become well established on Hawai'i island, but is not yet ubiquitous on the other main Hawaiian islands. At a hearing held earlier this year before a handful of state senators, Neil Reimer of the DOA's Plant Pest Control Branch underscored the importance of maintaining control efforts against this noisy hitchhiker.

O'ahu's two designated coqui control experts caught 78 coqui in fiscal year 2012 over 91 site visits. They spent more than 500 hours looking for the frogs, Reimer reported.

So far, coqui have been detected consistently at only two sites on O'ahu, he said. Even so, he said, "without these two guys, O'ahu would be like Hilo," where coqui calls are now ubiquitous at dusk, even downtown.

With a handful of established coqui populations on Maui, including a widespread infestation in Maliko Gulch, even the relatively isolated islands of Moloka'i and Lana'i are at risk. Coqui interceptors with the Moloka'i Invasive Species Committee found six coqui on Moloka'i last year and two on Lana'i, according to Teya Pennimann of the Maui Invasive Species Committee.

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Yellow Raspberry Biocontrol Hunt

One of the nastiest plants to invade Hawai'i forests is the Himalayan yellow raspberry (*Rubus ellipticus*). And not only is it a problem here, say experts in invasive species, it is one of the worst invasive species in the world. The thick, thorny, impenetrable strands threaten lowland forests and displace native species, including the native Hawaiian raspberry. The Ola'a Forest tract of Hawai'i Volcanoes National Park is especially vulnerable to invasion by the plant.

The hunt to locate its natural enemies – and pinpoint a likely biocontrol agent – is the subject of an article in the January 2013 issue of *Pacific Science*. Over a period of six years, the article's authors (five based in Chinese research institutions, one from the U.S. Department of Agriculture) collected potential natural enemies of the plant – both insects and pathogens – at more than 30 sites in southwestern China.

In Hawai'i, making sure that any biocontrol agent won't take out the native raspberry is critical. Of the 60-plus species of pathogens that the researchers examined, five of them were found exclusively on the Himalayan raspberry and on no other species.

While tests on any of the possible biocontrol agents will take years, the researchers note that their work "adds additional candidates in the form of a rust and a leaf-spot fungus never before considered." If they are used together with some of the insects identified, it "may improve the overall effectiveness of control programs."

Tracy Johnson with the U.S. Forest Service's Institute of Pacific Islands Forestry in Hilo noted that the work was supported with funds from the Hawai'i Invasive Species Committee and some Forest Service funds as well.

Because of the Hawaiian species of *Rubus,* Johnson said, "we need high specificity, and that's a high bar" for any biocontrol agent. But, "we won't know unless we try. Prospects of finding one are pretty decent," he said, adding that a leaf beetle and a variety of rust looked promising.

The invasive-species research group CABI, with support from the Forest Service, is continuing the hunt for a biocontrol agent for the Himalayan raspberry, this time on the western side of the Himalayas, in India and Pakistan, Johnson said. "We're piggybacking on their work" in the region, Johnson said, noting that CABI has special expertise in pathogens. ***— T.D. and P.T.***

Feed-In-Tariff Program Managers Purge Flawed Projects From Queue

This month, the Hawaiian Electric Company is expected to submit its report to the state Public Utilities Commission re-examining the initial phases of its feed-in-tariff program, which guarantees participants that HECO, Maui Electric Company, and the Hawaii Electric Light Company will buy electricity generated by renewable sources at a fixed rate for 20 years.

The PUC capped the program at 80 megawatts statewide. The PUC-appointed independent observer for the program, Harry Judd of Accion Group, began accepting applications for Tier 1, for projects 20 kW or smaller, and Tier 2, for projects producing up to 500 kW, in November 2010. Tier 3, which opened in late 2011, allows for projects as large as 5 megawatts (MW).

The vast majority of the applications submitted to date has been for solar photovoltaic projects.

HECO's report, which was originally due on February 1, will help the PUC decide whether to add to or redistribute the program's capacity. Last month, the PUC granted HECO's request for more time to complete the report.

Among other things, the report is expected to address the management of the program's active and reserve queues. Last year, shortly after the opening of Tier 3, some applicants eagerly waiting in the reserve queue accused several of the projects in the active queue of squatting and claimed that some of them should never have been accepted to the FIT program. After receiving a report from Judd confirming some of the problems with the queue and raising a number of his own concerns, the PUC ordered Judd and HECO to freeze the queue until all ineligible projects were purged.

After a review by HECO and Judd, 58 projects totaling 52 MW were removed from the queues on October 8, according to a January 14 joint status report on the clean-up. Projects were removed for various reasons, but mostly for failure to submit a timely building permit application or for having multiple projects on the same lot.

All but one the projects were for Maui and O'ahu, and none were from Tier 1.

The purge freed up a fair chunk of space in the active queue — a little more than 14 MW. All but a small fraction of that came from projects proposed for O'ahu and Maui. Once the queues were reopened, the program received 57 new applications, the report states. As of January 10, the active queue had about 16 MW of capacity left and more than 100 projects totaling 91 MW sat in the reserve queue.

Despite the program's growing pains, it has managed to make some headway. As of January 10, 81 Tier 1 and Tier 2 projects generating a little more than 8 MW (or 10 percent of the program's capacity) had been installed. No Tier 3 projects had yet been installed, but about 63 applications for projects totaling about 27 MW were in the active queue.

— T.D.