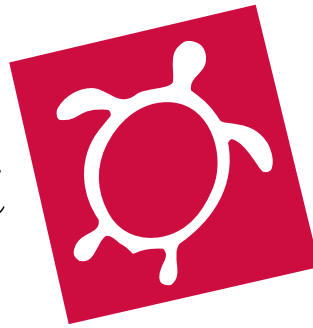


Environment



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Summit Talks

When the Board of Land and Natural Resources recently took up discussion of a management plan for Mauna Kea, it was no surprise that testimony took up the better part of two days. In matters affecting management of the mountain, it seems, there is little middle ground.

As Teresa Dawson reports in the cover story, board approval of the plan is only the first step in what promises to be a long and hotly contested process.

Also in this issue, we look at the Western Pacific Fishery Management Council's actions to restrict public access to council records, as well as its footdragging on compliance with Freedom-of-Information-Act requests.

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BOARD TALK

Mauna Kea Management Plan Wins Conditional Approval of Land Board

By all accounts, the Mauna Kea Comprehensive Management Plan (CMP), prepared by contractors for the University of Hawai'i and adopted on April 9 by the state Board of Land and Natural Resources, isn't what it should be. Even its authors and supporters admit that it's a work in progress. Most notably, it doesn't address any proposed new development for the summit of Mauna Kea, despite the fact that the site is one of only two (the other is Chile) being considered for the massive Thirty Meter Telescope (TMT).

Because of the plan's deficiencies, the Land Board has required the university to submit for approval four sub-plans – regarding public access, natural resources, cultural resources, and the decommissioning of telescopes – within one year or before the submission of a Conservation District Use Application for

any new use, whichever comes sooner.

When Land Board member Tim Johns asked the Department of Land and Natural Resources' Office of Conservation and Coastal Lands administrator Sam Lemmo whether he was comfortable with the fact that the CMP does not address decommissioning, the use of ceded lands for \$1 a year, the proposed TMT and Pan-STARRS (another telescope), and other major issues of community concern, Lemmo said, "I'm comfortable with the process moving forward."

Several people testifying at the Land Board's meeting requested or reserved their right to request a contested-case hearing challenging board approval. As of mid-April, the OCCL had received follow-up written requests for a contested case hearing from Dwight Vincent, Clarence Ching, KAHEA:

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A view of some of the observatories at the summit of Mauna Kea.

PHOTO: OFFICE OF MAUNA KEA MANAGEMENT

Environment Hawai'i

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NEW AND NOTEWORTHY

Environmental Council 'Marginalized':

Robert A. King has submitted his resignation as chairman of the state Environmental Council, setting forth his reasons in a blistering letter to Governor Linda Lingle.

"I find I cannot perform my duties due to lack of support by the administration," King wrote in his letter dated April 7. "During the last two years the Environmental Council has been marginalized to the point of irrelevance.... [T]he situation continues to degrade."

King recited a list of grievances, including:

- The council completed an update of its rules in 2007 and sent them to the governor's office, but "We never received a response of any kind."

- No travel was provided for neighbor island members, who were told to use video conference facilities instead. However, "with

limited or no technical support available, the system has not worked correctly for a single meeting."

- Council meetings were moved from the Office of Environmental Control to "a very small room in the basement at Kinau Hale, where half the people present had to stand... Next we moved to the VCC [video conference center]..., which is even smaller. The current meeting options are extremely discouraging to any public involvement whatsoever."

"Although I have met with management at the [Department of Health] and with staff at your office, the situation continues to deteriorate. I do not believe the Council is viable at this level of support," King concluded.

The term of King, president of Pacific Biodiesel, was set to expire in 2012.

The Environmental Council approves agency lists of activities exempt from environmental review and issues rules implementing the state environmental policy act.

"Missing Exit Signs:" For years, the "EXIT" signs in almost all Wal-Mart stores were lit up by tritium, a radioactive isotope of hydrogen. The electron decay from the tritium causes phosphor-coated tubes to glow, lighting the signs even in power outages.

Then Wal-Mart discovered that possession of tritium requires a license from the Nuclear Regulatory Commission, since tritium is widely used in the manufacture of nuclear weapons. So in 2007 it began replacing the signs.

At that point it discovered some 16,000 signs were missing, including 17 from the Wal-Mart stores on Ke'eamoku Street in Honolulu and in Pearl City.

Nothing suggests that a group of determined nuclear terrorists stole the signs to get tritium needed to make a dirty bomb, but there is a better-than-even chance that the tritium ended up in landfills or dumps or, if broken, dispersed around the exits. The radioactivity from tritium is relatively weak, but tritium is water-soluble. If it gets into human food, it can pose a serious health hazard.

Wal-Mart gave a final report on the missing signs to the NRC in January. Some signs may have been removed by contractors as surplus or may have been tossed out, it said, but "one of the options, 'unauthorized removal by a person,' may represent the most likely disposition."

At Long Last, Resolution: One of the final acts of Big Island planning director Chris Yuen before a new administration took office last December was to resolve a case of long-standing Special Management Area violations in Kohala.

The violations involved illegal grading and clearing by Ahmad Mohammadi and the company he owns, E Commerce Enterprises Corporation, starting in 2003. In 2005, the Planning Department slapped Mohammadi with a \$400,000 fine for bulldozing and carving out roads down a steep-sided gulch. Mohammadi also was sanctioned by the state Board of Land and Natural Resources for unpermitted work in the Conservation District near the shore.

Resolution of the infractions at the county level dragged out for years. Finally, last November, the county Planning Commission approved an after-the-fact SMA permit for some of the work, while requiring Mohammadi to remediate the road down the gulch with plantings. Fines were reduced to \$100,000, with Mohammadi being able to apply that toward the cost of remediation.

For more information, see the June 2005 "Board Talk" column and the article in the January 2006 issue of *Environment Hawai'i*. Both are available in our on-line archive: www.environment-hawaii.org.

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Quote of the Month

*"How can a plan be considered
'all-inclusive' when it ... leaves significant
management questions unanswered?"*

— **Marti Townsend, KAHEA**

Wespac Erects More Hurdles in Path Of Public Seeking Council Information

When it comes to the free flow of information, the Western Pacific Fishery Management Council (Wespac) has locked itself into the proverbial smoke-filled back room. While other regional councils are taking steps to make their actions more transparent, the Honolulu-based council has been pulling down the shades. And while the administration of President Obama has exhorted executive agencies to “disclose information rapidly in forms that the public can readily find and use,” Wespac has taken affirmative steps to discourage public access to information about the council’s practices – even as the council faces a lawsuit alleging Freedom of Information Act violations and has been dragging its feet on complying with a plethora of other FOIA requests.

At the council’s March meeting in American Samoa, it voted to amend its “Statement of Organization Practices and Procedures” in several respects having to do with public access to council records. Among other things:



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none, as chairman Sean Martin began to call for a vote on a motion to approve when Linda Paul, director for aquatic resources of the Hawai'i Audubon Society, reminded him that the public had not been given a chance to testify.

Martin halted the vote, allowing Paul to speak in opposition to the changes. She included in her testimony comments from council member Peter Young, who could not attend the meeting but had shared his concerns with Paul in an email message. Indeed, Young’s email served as the only heads-up to anyone outside of the council’s inner circle as to the nature of the proposed changes. The agenda gave no hint of what was under consideration, identifying the matter only as: Agenda Item 13.F, “SOPP.”

“If these changes go through we will be forced to use FOIA to get anything meaningful from Wespac.”

— Peter Young, council member

- Council minutes, previously available for inspection at the council office in Honolulu, are now to be available only upon the filing of a FOIA request.

- The council’s “chart of accounts,” which details how financial records are to be kept and which was previously available for inspection at the council office, is again only available through the filing of a FOIA request.

- Procedures for travel reimbursements, once available for inspection at the council office, are now off-limits altogether.

The matter came before the council at the end of the final day of its four-day meeting, and council members showed little interest in having the rationale for the proposed changes explained by Kitty Simonds, the council’s executive director, or her staff. No document was available to members of the public that described or explained the amendments, making a mockery of the opportunity for public comment. It was clear that the council expected

Young, who has been at loggerheads with Simonds over the lack of transparency in council management, voiced his disappointment in the statement read by Paul. “We thought it was hard to get information from Wespac in the past,” he said in his email to Paul, which she had permission to relay to the council. “If these changes go through we will be forced to use FOIA to get anything meaningful from Wespac.”

“This seems in direct contradiction to the recent statements by the president about being more open and providing information to the public.”

Paul credited Young with alerting her and others to the proposal to change the SOPP. But when Paul checked the table at the back of the meeting room, where council staff makes available information on those items appearing on the agenda, there was nothing at all on the SOPP changes, she said. “So I’m going to have to take Peter Young’s word, what he said, as to the nature of those changes...”

The changes, she said, “would restrict access to information currently available to both the council and the public. For example, the ... current SOPP requires that council staff provide regular financial reports to the council and to the public. The proposed change would delete this section and others which cover employment practices, grievance procedures, termination procedures and required reports. If removed from the SOPP neither the council nor the public would be aware of the existence of these procedures and reports.”

Paul took note also of the changes with regard to minutes, the accounts chart, procedures for processing travel claims, personnel rules, and other procedures.

“The proposed restrictions on information now available to the public were brought to our attention, as I said, by Peter Young who, even though he is a member of this council, and as such has oversight responsibility over council staff, has had difficulty getting access to the previously mentioned procedures and records under the current SOPP. The proposed changes would make it even more difficult for this council to exercise its oversight responsibilities over council staff and their work and restrict the public’s right to know what its public servants are doing,” Paul said.

“The Freedom of Information Act reflects our nation’s fundamental commitment to open government. But its existence does not imply that this is the route that the ordinary citizen should have to take in order to monitor the agencies that are administering public policy or spending public funds. While the FOIA does provide disclosure exemptions for certain things as national security matters, private personnel records, and ongoing enforcement actions, these are the exceptions, not the rule.”

The motion to approve the changes passed, with Dan Polhemus, a council member representing the state of Hawai'i, casting the sole dissenting vote.

But the council action may not be the last word. Under the Magnuson-Stevens Act, amendments to council SOPPs must be approved by the Secretary of Commerce. Concerns over the council’s amendments may be addressed to acting NMFS administrator James Balsiger, or the head of the National Oceanic and Atmospheric Administration, Jane Lubchenco.

Already, Young has registered his protest. In a formal “Statement of Disagreement” with the council’s revisions, dated April 18, Young gave Secretary of Commerce Gary Locke the particulars of his objections.

New Language Proposed on Lobbying Limits

Of the many complaints about actions taken by Kitty Simonds, executive director of the Western Pacific Fishery Management Council, one of the most frequent and serious concerns the council's apparent involvement (directly or through contractors) in lobbying at the state and federal level.

Changes proposed by the National Marine Fisheries Service would tighten up language intended to prohibit lobbying by councils. The changes are included in proposed rules published March 27, 2009, in the *Federal Register*.

First, in the existing section (50 CFR Part 600, § 225) titled "Rules of conduct," a paragraph that now protects council employees from being fired or punished for their political affiliation is deleted. In its stead is language requiring "council members, employees, and contractors" to com-

ply with the restrictions attached to the grants through which the councils receive federal funds. Those "Federal Cost Principles applicable to Regional Fishery Management Council Grants and Cooperative Agreements" contain proscriptions on lobbying, but the new language emphasizes this, noting that compliance is required "especially with regard to lobbying."

Second, an entirely new section (§ 600.227, titled "Lobbying") is proposed to be added to the regulations. Under this section, council members, employees, and contractors are instructed to comply with proscriptions on lobbying contained in both federal law and Department of Commerce regulations.

Much of the proposed new language is taken directly from the restrictions on lobbying that appear in Appendix B to "Federal Cost Principles" (2 CFR Part 230, also known as OMB Circular A-122).

Here, the list of prohibited activities

specifically calls out efforts to influence:

- The introduction of federal or state legislation;
- The "enactment or modification" of pending legislation through such means as "preparing, distributing, or using publicity or propaganda, or by urging members of the general public to contribute to or participate in any demonstration, march, rally, fundraising drive, lobbying campaign, or letter writing or telephone campaign."

An exception is made for providing "a technical and factual presentation directly related to the performance of a grant, through hearing testimony, statements, or letters to Congress or a state legislature... if made in response to a documented request."

Deadline for comment on the proposed rules is July 7, 2009. (For more information on the proposed rules, see the link on our website, www.environment-hawaii.org.) — P.T.

"The most egregious of the revisions removes provisions that require Reports and Information to Council members on a regular basis," Young wrote. "And to further insult the public process, the proposed revisions to the SOPP were never available for public review, neither prior to nor at the 144th meeting."

"Because they strictly limit information on Council operations, they limit my ability to comply with the oath, taken upon my appointment to Wespac, 'to serve as a knowledgeable and experienced trustee of the Nation's marine resources'..."

The revisions also conflict with the Council Rules of Conduct, Young wrote, noting that those rules require financial interest information be made available for public inspection at Council offices. The revised SOPP, Young wrote, "specifically deletes that requirement."

Young concluded his comments by asking that the council's SOPP revisions be rejected "in their entirety."

Conflicts with Magnuson-Stevens

The council's efforts to make access to certain records more difficult by amending its SOPP are in direct conflict with the

requirements of the Magnuson-Stevens Act, which governs actions of all eight fishery management councils.

According to the latest reauthorization of the act, which occurred in 2007, detailed minutes are to be kept for each open council meeting and are to include copies of all statements filed during the meeting. Those minutes, as well as "other documents which were made available to or prepared for or by the council, committee, or panel incident to the meeting, shall be available for inspection and copying at a single location in the offices of the council."

Environment Hawai'i requested to see all the materials distributed to council members at the Samoa meeting. In addition, a separate request was made for the documents relating to the SOPP changes. By press time, no response had been received.

The day following the council's vote on the SOPP changes, the National Marine Fisheries Service published in the *Federal Register* of March 27 proposed changes to regulations governing the operations and administration of all fishery management councils. One area in particular

that NMFS called out were council statements of organization, practices, and procedures.

Noting that "the general public often does not understand the councils' functions, how they are organized and what their limits are in fisheries management and policy," NMFS proposes requiring SOPPs to be made available on the internet. (The Wespac SOPP is already on the council's website, www.wpcouncil.org, under the "About Us" link. At press time, the revisions to the SOPP had not yet been posted.)

In addition, the proposed rule would require changes in the content of SOPPs. They would need to include a clear description of the procedures by which councils propose regulations. Also, amendments to SOPPs would need to be consistent with the terms of the grants NOAA provides to the councils for their operation, the Magnuson-Stevens Act, and other federal law.

The deadline for comments is July 6. The *Environment Hawai'i* website (www.environment-hawaii.org) contains a link to the *Federal Register* notice.

— Patricia Tummons

FOIA Responses Shed Light On Council Support of Puwalu

Efforts by the Western Pacific Fishery Management Council to incite Native Hawaiians to rise up in protest against nearshore fishery regulations go back several years. The first public manifestation of this campaign occurred in August 2006, when a puwalu, or conference, was held at the Hawai'i Convention Center in Honolulu.

The outcome of that conference, attended by about 100 Native Hawaiians, was a resolution "to begin the process to uphold and continue Hawaiian traditional land and ocean practices into the governance and education of the Hawai'i archipelago." The resolution also called for "the perpetuation and preservation of the knowledge of practitioners and the restoration of healthy ecosystems through furtherance of the 'ahupua'a management system, including konohiki management with kapu and ho'a'aina rights, and the re-establishment of the 'Aha Moku," or island councils.

Over the next 14 months, four more puwalu would be held as well as a dozen or more other invitation-only meetings, all involving Hawaiians, intended to support the puwalu goals. And with each puwalu, concerns grew among council observers that the real intention behind the meetings was to undercut state management and regulation of fisheries and other marine resources nearshore waters.

Throughout the 2007 legislative session, the goals espoused in the resolutions adopted at the puwalu were frequently invoked by people testifying in support of several bills – notably, a "freedom to fish" measure that would have undercut state regulation (it failed), and another, which passed, establishing an 'aha kiole committee, the first step toward setting up 'aha moku.

The council made no secret of its support for the puwalu. In program materials, the council identified itself as "host" of the event, while other organizations that assisted in some way – the Association of Hawaiian Civic Clubs, the Hawai'i Tourism Authority, Kamehameha Schools, and the Office of Hawaiian Affairs – were identified as sponsors. Named as coordinator of the puwalu was the Pacific Islands Resource Management Institute, or PIRMI. The puwalu "owes its success to the steadfast endeavors and commitment of Leimana

and Bob DaMate of PIRMI," reads a statement in the materials distributed to those attending the conference.

Follow the Funds

How much did the council, which is funded entirely by the federal government, end up spending on the puwalu and in support of lobbying at the state level? And was this activity approved by the council's overseers in the National Marine Fisheries Service?

Those questions were behind a Freedom of Information Act request filed by *Environment Hawai'i* with the council more than a year and a half ago. Two responses were received in the first few months (reported on in earlier issues of *Environment Hawai'i*), but the final response was not received until late March.

According to those records, Leimana DaMate contracted with the council for the first time in February 2006. This provided for her to be the council's "Hawaiian Cultural Ocean and Ecosystem Principles Coordinator." Duration of the contract was roughly 14 months, through the end of March 2007.

The statement of work included in the contract has a long disquisition on the deleterious impacts of regulation by "foreign colonizers and immigrants:"

"Given their long histories of sustainable use of marine resources, indigenous residents of the Western Pacific Region, including Hawai'i, have not universally embraced increasingly prohibitive management necessitated by the modern influx of foreign colonizers and immigrants."

The SOW also takes a jab at environmental groups, several of which had become increasingly critical of the council's tilt in favor of commercial fisheries interests: "[S]ome recent campaigns by non-governmental organizations representing often far-off groups vigorously opposed to virtually all use of marine resources have increased what many see as the separation of local residents from the natural environment that surrounds them."

Under contract terms, DaMate was supposed to organize at least 16 "community educational programs and workshops" (two on Kaua'i, four on O'ahu, one each on Moloka'i and Lana'i, three on Maui, four on the Big Island, and one on Ni'ihau).

For this work, DaMate was to be paid \$50,000.

On August 1, DaMate and council executive director Kitty Simonds signed an amendment to the contract, adding \$31,800 to DaMate's contract in return for which she was to organize three puwalu. Of the \$31,800, \$15,000 was for "coordinator compensation," and \$16,800 was for "consultant fees." Given that the first puwalu was held just days later, the question arises as to whether the contract amendment was, in fact, made to give a fig leaf of legitimacy to payments already made to support that effort.

Checks attached to the contract suggest that was exactly what happened. On July 11, 2006, three weeks before the contract amendment was executed, a check from the council, signed by Simonds and council chair Sean Martin, was made out to DaMate in the amount of \$24,925.

Although the contract was to cover services through the end of March 2007, final payment to DaMate was made in January 2007. A month later, in February, DaMate signed on as "ahupua'a puwalu planner and event contractor." The scope of work called for DaMate to organize eight community meetings "to organize the 'Aha Moku and 'Aha Kiole," to coordinate the fourth puwalu (April 2007), and to plan for the Regional Ecosystem Advisory Committee meeting (late April).

For work through August 5, 2007, DaMate was to be paid \$21,000.

The third contract with DaMate was signed in early October 2007. Again, the title of DaMate's contractual position was "'ahupua'a puwalu planner and event coordinator," and her chief task was to organize the fifth, and final puwalu, which began later that month. For this, DaMate was paid \$5,250.

Over and above the contracts with DaMate, the Pacific Islands Resource Management Institute, described as a non-profit organization whose officers included Robert and Leimana DaMate (and whose address was also that of the DaMates), received \$30,000 on a council purchase order dated August 11, 2006. This was for "travel and related expense costs associated with the Puwalu to be held August 15-17, 2006." There is only a short description of the services provided:

- "Coordination/disbursement of per diem to puwalu travelers — \$21795 — 77 projected travelers supported by the council";
- "Registration and Secretariat Support at the puwalu ... \$6205 — pre-registration on

The State's Support for Puwalu

The greatest financial support for the third puwalu, held in Honolulu on December 19-20, 2006, came not from the Western Pacific Fishery Management Council or the Office of Hawaiian Affairs. Rather, it came from the state Coastal Zone Management program, housed in the Office of Planning within the Department of Business, Economic Development, and Tourism.

According to Doug Tom, program manager, Leimana DaMate first approached him, and then "Kitty [Simonds] came to see me" about sponsoring the puwalu. Tom said that while developing the state Ocean Resources Management Plan, he sought to bring more Hawaiians into the process, and he viewed this as a good way of doing so.

Documents that Tom provided indicate that the CZM share of the cost came to just under \$50,000. Of that, \$26,749.75 went directly to the Ala Moana Hotel for meeting rooms and other services (coffee break refreshments and the like) for three days (the two days of the puwalu, plus a pre-

conference meeting on the December 18). A second payment of \$23,150.07 was paid to Pacific Rim Concepts, LLC, to cover the lodging costs for 58 puwalu participants.

Not all participants enjoyed the same level of comfort at the hotel, to judge from the state's records.

Most of them were in rooms where rates were \$166 a night. Most participants also stayed just one night, arriving the morning of the 19th and departing the evening of the 20th. But state Rep. Mele Carroll stayed three nights in a premium room (\$277.41 a night, for a total of \$832.23), as did Jean Ilei Beniamina of Kaua'i and Ni'ihau and Alice Worthy. Carroll, a Maui Democrat, was at the time vice chair of the House Committee on Energy and Environmental Protection. Beniamina now sits on the state 'aha kiole committee, established by the Legislature as a result of the political activity inspired by the puwalu. (Puwalu briefing books included brief write-ups of Carroll, Beniamina and most other participants. Worthy was not mentioned, however.)

In her gift disclosure form covering the period of the third puwalu, Carroll does not list the comped hotel room or the several meals that were included for conference participants. An attorney with the state Ethics Commission stated that because the conference was apparently sponsored by a federal agency, the commission would not be likely to find her non-disclosure to be a violation of its rules.

According to the fishery management council, it paid out \$49,505 for the event. OHA contributed \$25,000, the council records show. OHA did not respond to requests for information by press time. However, the program indicates that OHA hosted a luncheon at the hotel.

The Hawai'i Tourism Authority paid \$10,000 in support of the first puwalu. According to a staff person with the HTA, the money was not designated for any specific purpose. She said that the agency had been approached by DaMate with the proposal to help underwrite conference costs. The check was made payable to PIRMI, she said. — *P.T.*

August 14, registration and support on August 15-17 (10 hrs per day)";

- "PIRMI Admin/Overhead—\$2000." PIRMI, if it ever did exist, does not exist now. No record of any registration for it can be found in the state Department of Commerce and Consumer Affairs.

Altogether, the payments made by the council to DaMate and PIRMI came to \$138,050. But that was not the extent of council support.

A spreadsheet that the council provided to *Environment Hawai'i* showed it spent a total of \$330,847 on the five puwalu. There is no breakdown of the expenses, however, which are shown only as a lump sum for each conference (\$108,865 for the first, \$66,604 for the second, \$49,505 for the third, \$77,800 for the fourth, and \$38,073 for the fifth).

Reprogrammed Funds

The puwalu were not anticipated in the council's budget submitted to the National Marine Fisheries Service. Yet in the six-month report submitted to NMFS by the council, covering the second half of 2005, Simonds indicates that funds that

had been intended for a baseline study of coral reefs in Hawai'i had been redirected to support "Hawaiian cultural fisheries and ecosystem information compilation."

According to the terms under which the council receives grants, changes in program expenses, up to 10 percent of the value of the grant, can be made without NMFS' prior approval. Funds made available to the puwalu series by this means came to \$80,950—roughly equal to value of DaMate's first contract, as amended.

Still, it is impossible to know from records made public just how much the council has spent on the puwalu series and related meetings. Semi-annual reports that the council has to provide to NMFS contain brief summaries of activities, but do not have any dollar amounts attached. For example, in the "progress report" on council activities for the second half of 2006, activities in support of the three puwalu held in that time frame show up under several different program headings:

- Under the broad heading of "community development demonstration pro-

gram," there is the statement that the council "staff planned and coordinated three conferences on Hawaiian traditional management practices..." Also, funds were spent on "computer equipment for indigenous coordinator."

- Funds from a 2005 coral reef ecosystem grant (total value: \$525,000) were used to support "travel for lawai'a (expert fishermen) to participate in the ... puwalu," and to rent audio equipment and print programs for the first puwalu. Again, there are no dollar figures associated with any of these tasks.

- With funds from a 2004 coral reef grant (also for \$525,000), the council contractor "identified and interviewed over 75 individual lawai'a" and developed a "database containing specific information about spawning cycles and abundance/density indicators."

The semi-annual reports for 2007 showed funds to support the puwalu were drawn from the "indigenous program" and the Community Demonstration Project Program. No mention of puwalu is made in the report of activities supported by the coral reef program. — *P.T.*

Fishery Council Balks in Complying With Freedom of Information Act

The Western Pacific Fishery Management Council's vote to make certain records available to the public only through Freedom of Information Act requests and others available not at all came exactly one week after U.S. Attorney General Eric Holder issued instructions to federal agencies that they should not only presume records are open, but should also "make discretionary disclosures of information."

"As President Obama instructed in his January 21 FOIA Memorandum," Holder wrote, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."

Even if an agency can demonstrate, "as a technical matter, that the records fall within the scope of a FOIA exemption," he wrote, that is in itself not sufficient reason for withholding them.

"At the same time, the disclosure obligation under the FOIA is not absolute," he wrote. "The act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, 'The government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.'"

Under guidelines issued by former Attorney General John Ashcroft on October 12, 2001, the Department of Justice would defend agencies against FOIA claims unless the agencies lacked a "sound legal basis or [disclosures] present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Now, wrote Holder, "the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Holder admonished agencies against establishing "unnecessary bureaucratic hurdles," saying they have no place in the "new era of open government that the president has proclaimed."

"Open government requires agencies to work proactively and respond to requests promptly," he continued. Obama's memorandum instructs agencies "to use modern

technology to inform citizens what is known and done by their government," he wrote. "Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs."

Contrarian Moves

Wespac, which has never been aggressive in defending the public's right to know what the council is doing, would now seem to be swimming against the current set by the Obama and Holder memos. Whether, or for how long, it can continue to do so is the question on many people's minds these days.

For the last two years, council actions have been the subject of numerous FOIA requests, including several by this publication.

Last January, three groups filed a lawsuit in U.S. District Court in Honolulu against the council, the NMFS Pacific Islands Regional Office, and the Department of Commerce, alleging the agencies have failed to comply with the requirements of the Freedom of Information Act. The groups – the LOST FISH Coalition, the Conservation Council for Hawai'i, and KAHEA: The Hawaiian Environmental Alliance – allege that by not responding within the time frame set by FOIA to their requests for information, the federal agencies effectively are in violation of FOIA.

The initial FOIA request, seeking information on the council's federal grants, budgets, and contracts, was filed by LOST FISH in November 2007, with CCH and KAHEA also as parties to the request. NMFS provided "some information," the complaint states, but asked the coalition to refine its request, which it did in April 2008. Since then, according to the lawsuit, no further response to the FOIA has been received.

A year ago, the coalition filed a formal appeal, arguing that withholding of the records constituted denial. NMFS had not issued a decision on that appeal by the time the litigation commenced in January.

According to the complaint, "Wespac executive director Kitty Simonds has repeatedly stated that Wespac contracts and other records are freely available to the public at the Wespac library during Wespac

business hours. Yet when LOST FISH attempted to access this information in the fall of 2007, through direct visits to the Wespac library during business hours and subsequent non-FOIA requests to Ms. Simonds, Ms. Simonds repeatedly denied LOST FISH access to the information."

No date for a hearing had been set as of mid-April.

And an Appeal

Over the last 18 months, *Environment Hawai'i* has filed three formal FOIA requests for records that should be held by the council. In March, final responses were provided by NMFS to two of them. A response to the third was in process at press time.

In one instance, the information sought – documents relating to contracts between the council and the various parties who organized the series of puwalu on behalf of the council – were finally provided, some 16 months after the request was made.

In the second case, information was sought concerning several federal grants awarded to the council and travel records for Simonds and five council members. The records provided in the response were incomplete, and in the case of the travel records, altogether absent. According to the letter drafted by Kelvin Char, FOIA officer for the PIRO office since last summer, with respect to travel records, "the council indicated that no responsive records were located." (Char also happens to be the NMFS staffer charged with overseeing council compliance with terms of its many federal grants, worth several million dollars a year.)

The response indicates one of the problems NMFS faces. By law, the NMFS regional offices are charged with handling the FOIA requests seeking records maintained by the councils. In the case of Wespac, the Pacific Islands Regional Office in Honolulu serves as the liaison between the requester and the council.

If council staff did indeed state, as Char maintains, that it found no records responsive to the request for information on travel, then there are only a few explanations – none good. The council never required documentation of travel to be made in the first place. Or the documentation was received but destroyed. Or Wespac has lost the records. Or, finally, the council is lying to NMFS.

Environment Hawai'i is appealing the effective denial of these records. The appeal notes that under the terms of the grants that Wespac receives, the council is required to

Report on Water Use Permits Reveals Violations of Terms Are Commonplace

What's to be done when the state doesn't follow its own rules? And not just the state, but county agencies and the majority of other holders of water use permits?

The question arises in the course of reading the recent report by the Commission on Water Resource Management on the status of water use permits issued in its first two decades. The commission is required by law to make such a report to the Legislature at least once every 20 years. This report covers the period from 1987, when the commission was launched, to June 15, 2007.

Here are some of the chief findings, based on a review of 359 active permits by the commission's contractor, Brown and Caldwell, Inc. (There were actually 403 permits issued, but the contractor was unable to check on the status of 44 wells, owned by 35 permittees, "despite best good-faith efforts either because of a complete lack of response from permit holders, or because scheduled visits were cancelled by the permit holder with no further correspondence.")

- Holders of just 16 percent (56 permits) were found to be in full compliance with permit terms and conditions.

- Two-thirds of permit holders (240 per-

mits, or 67 percent) did not submit required reports.

- For more than a third (129 permits, or 36 percent), information on the location of the water source or place of its use in the commission's files did not match actual conditions.

- Eleven percent (41 permit holders) had engaged in pumping more water than allowed by their permits, with overpumping continuing to occur in the case of 27 permits.

"[M]any permit holders stated that they had received no correspondence or communication from the Commission in years."

— Brown and Caldwell report

Among the permit holders who did not cooperate with the investigation are some of the biggest water users in the state — including state agencies. They include the Agribusiness Development Corp., the state entity that runs the Waiahole Ditch on O'ahu; the Kahala Hotel and Resort, H-POWER, the Department of Hawaiian Homelands on O'ahu, the Honolulu departments of Parks and Recreation and Wastewater Management, the Honolulu Board of Water Supply, and the Maui Department of Water Supply. The Department of Land and Natural Resources' Division of State Parks also appears on the list of non-cooperating agencies, but, according to DLNR spokesperson Deborah

Ward, "commission staff had been working closely with State Parks staff and field-investigated this [Parks Division] well on a different issue. Therefore, we did not require the consultant to double-investigate this well."

Ignorance as an Excuse

By far, the majority of violations involved failures to conform with reporting requirements of water use permits. Of the 240 violations noted, 133 permits (37 percent) lacked an approved flow meter, needed to measure withdrawals. Without this, it is impossible to know if amounts of water used exceeded what was allowed. Thirty-one percent (112 permits) did not report

water use at all.

"Through this review," the report states, "several permit holders stated that they did not know of any requirements for reporting water use, chloride concentrations, and water levels as part of their permit conditions despite written documentation." That documentation includes "at least two statewide water use reporting notifications and distribution of reporting forms efforts in 1991 and 1992" and the inclusion of water use reporting requirements in all water use permits issued.

"Also," the report continues, "many permit holders stated that they had received no correspondence or communication from the Commission in years. This applies

retain such records and make them available to NMFS. Over and above the requirements imposed on recipients of grants, the council is subject to the record-retention requirements imposed on federal agencies. Under the regulations of the National Oceanic and Atmospheric Administration, "Council records must be handled in accordance with NOAA records management office procedures. All records and documents created or received by council employees ... belong to the Federal Government."

"While we understand that FOIA requests for council records are to be coordinated with the NMFS regional office, it is baffling that the regional office should be as deferential to the council's desire for secrecy as it has been in this instance," the appeal states.

As of mid-April, no response to the appeal had been received.

— Patricia Tummons



West Maui Mountains Watershed

PHOTO: WEST MAUI MOUNTAINS WATERSHED PARTNERSHIP/CHRIS BROSIUS

mainly to smaller private or commercial users; however, 62 of the reporting violations noted are associated with permits held by the municipal water agencies on O'ahu, Moloka'i, and Maui."

Another major compliance snafu was failure to report changes in the location of the source or end use. This, Brown and Caldwell determined, was the result of initial failure to record the tax-map key locations on the permit application or in the commission's data base, or because crop areas had been expanded beyond the original permit area, or as a result of legal subdivision or consolidation of properties.

Overpumping was defined to occur whenever the 12-month moving average of water withdrawals exceeds the permitted withdrawal rate at any time. On that basis, 47 permit holders—13 percent—were found to have violated their permits at some point over the last four years. The Honolulu Board of Water Supply was far and away the most egregious violator in this area: of the 24 permits it holds where overpumping was occurring, 13 wells were still being overpumped at the time of the Brown and Caldwell study. In the case of two users (the BWS and the Maui Department of Water Supply), overpumping had occurred at some of its permitted sources for the entire four-year period reviewed.

One of the most important signals used in monitoring underground water sources is the level of salinity, and for this reason, the Water Commission requires permit holders to report on the chloride concentrations in each monthly report that is to be submitted. Here, again, the rule is observed in the breach, with two-thirds of permit holders failing to provide information on chlorides in the water they draw down.

Non-Use

Water Commission regulations say that when a permit is not used for a period of four years, the commission "may permanently revoke the permit." Brown and Caldwell identified 76 permits where water users had not drawn down their full allotment in the 2004-2007 time frame.

Of those permits, listed in Appendix G ("4-Year Partial or Total Non-Use"), just one showed no use at all (a permit for 39,000 gallons a day held by Hawai'i Reserves). Two used between 1 and 20 percent of their allocation, 13 between 21 and 40 percent, 12 between 41 and 60 percent, 21 between 61 and 80, and 33 at 81 percent or more.

While some might conclude from this that there is water to be "found" in unused

Reporting Infractions: More than a Technicality

The temptation to dismiss reporting violations as mere technical infractions is often strong, especially among the violators. But one of the best explanations of the importance of reporting water use information is found on the website of the Commission on Water Resource Management. We quote:

"Water use information is essential to the understanding of the behavior and response of our water resources to stresses from water withdrawals. Such information also ensures that demand is managed effectively within the sustainable limits of our water supply. Water use information can also be used to evaluate the effectiveness of alternative water management policies, regulations, and conservation activities; assess the impacts of population growth and corresponding increases in water demands; develop trends in water use; and make projections of future demands.

"In an effort to implement management policies of the Commission identified through the State Water Code, its

Rules, and the Water Resource Protection Plan, well owners are required to document and report their total water uses on a monthly and annual basis so that our public trust resources can be better understood and managed for future generations."

According to Deborah Ward, public information officer for the Department of Land and Natural Resources and the Water Commission, the commission is attempting to address the compliance issues identified in the report to the Legislature. In an email response to written questions, she stated: "The commission is developing a system that will automate the collection and monitoring of water use information to make it easier for permittees to submit their reports and for staff to enforce reporting requirements. Part of the solution will be through the department's recent efforts to facilitate resource enforcement through its Civil Resource Violation System, which the Board of Land and Natural Resources approved on December 12, 2008." — **P.T.**

allocations that could be put to better use by other parties, that's not likely the case. Most of the water allocations associated with the underused permits are relatively small, like the Hawai'i Reserves permit. Just two are more than 10 million gallons a day—one to the Navy (nearly 15 million gallons a day), and another to AES Hawai'i, Inc., the coal-burning power plant in Campbell Industrial Park (13 mgd). In both cases, their reported use is in the 81-percent-plus category, suggesting there's not a lot of margin between use and allotment.

The Brown and Caldwell report states that "further review is necessary for an across-the-board revocation of 4-year partial non-use," although "total non-use of allocations that have not been used over a 4-year period seems to be an issue the commission can address through revocation." But with only one small allocation falling into this category, the drawn-out process of revocation would hardly seem worth the effort.

Some of the violators employ commission members. Ward, the DLNR spokesperson, was asked whether Donna Kiyosaki would be recusing herself, since some of the

violations of the Honolulu Board of Water Supply apparently occurred while she was chief engineer, or whether Chiyome Fukino, head of the Department of Health, would recuse herself if violations of the DOH came before the commission. "We will seek the advice of the Ethics Commission and/or the Department of the Attorney General's office on any recusals," Ward wrote in an email response.

Water use permits are issued by the commission only in water management areas, which so far have been designated for the islands of O'ahu, Moloka'i, and Maui. For the first 20 years of the commission's existence, the designated WMAs dealt with groundwater. In 2008, outside the time frame covered by the report, the commission designated the surface water of West Maui as a water management area.

Brown and Caldwell's contract for the report called for payment of \$200,000. However, Ward said, the commission is "withholding final payment as we have identified discrepancies in the report."

— **Patricia Tummons**

Mauna Kea

(continued from page 1)

the Hawaiian-Environmental Alliance, Mauna Kea Anaina Hou, and a joint petition from the Royal Order of Kamehameha I, Moku o Mamalahoa, and Heiau Helu Elua.

Background

In 1968, the state leased the summit of Mauna Kea to the university for astronomical purposes. Over the years, plans adopted by the Land Board limited the number of major telescopes to 13. According to Lemmo, the university is "pretty much at buildout capacity" right now.

Despite the capacity limit, the Land Board approved a controversial Conservation District Use Permit in 2004 for the construction of six telescope components, called outriggers, for the W.M. Keck Observatory. In 2006, that permit was overturned by Third Circuit Judge Glenn Hara in response to a complaint brought against the Land Board by Mauna Kea Anaina Hou, the Hawai'i Chapter of the Sierra Club, Clarence Ching, and the Royal Order of Kamehameha I.

Hara found that the DLNR's rules require the adoption of a "comprehensive" management plan for Mauna Kea's summit before a CDUP can be issued for any use. He determined that neither the university's 2000 Mauna Kea master plan nor the DLNR's 1995 management plan met rule requirements.

While NASA funding cuts had stalled the Keck project by the time Hara issued his decision, the university, anticipating more development on Mauna Kea, hired consulting firm Ku'iwalu to draft a comprehensive management plan as soon as possible. The university's Office of Mauna Kea Management, which was established by the 2000 master plan, had already begun work on its own cultural and natural resource management plans, but according to UH president David McLain, Ku'iwalu was chosen to take the lead because the OMKM – with its tiny staff and \$1 million-a-year budget – lacked the resources to draft a plan quickly.

"We outsourced to make progress. Dawn [Chang, Ku'iwalu principal] and her team have tried to involve the Office of Mauna Kea Management and the Mauna Kea Management Board (also established by the 2000 Master Plan) and fulfill the rate of progress" needed by the university, he told the Land Board at its April meeting.

In the latter half of 2008, Ku'iwalu gathered public input for the proposed plan with the intention of seeking Land Board approval in December of that year. Had the board approved the plan by then, the university

planned to pursue state legislation this year to establish administrative rules for the OMKM. Even though the university's decision to do an environmental assessment pushed the CMP approval deadline to April, the university sought the rulemaking authority from the Legislature this year anyway.

Comprehensive enough?

When the university unveiled its CMP in February, many criticized the plan for failing to consider future development, address adequate compensation for the use of ceded lands, and include details of proposed management actions, among other things. The plan, which raises the possibility of limiting public access to the summit and other sensitive areas, also sparked concern among Native Hawaiian cultural practitioners that the university sought to restrict their activities on the mountain, which they consider to be one of the most sacred sites in the Pacific.

In a March 9 EA comment letter from the Office of Hawaiian Affairs, administrator Clyde Namu'o wrote, "[T]he current draft CMP is virtually silent on all land uses, thereby not meeting the basest requirement for a management plan." Namu'o referenced

"[T]his CMP includes no land use analysis and no mention of the Astronomy Precinct at all."

— Clyde Namu'o, OHA administrator

Judge Hara's citation of the DLNR's own rule (HAR Chapter 13-5) that states, "Management plan means a comprehensive plan for carrying out multiple land uses.... The plain meaning of the term 'comprehensive' suggests a scope that is 'all-covering, all-embracing, all-inclusive, all-pervasive'..."

Namu'o continued, "Presuming that the University of Hawai'i intends, should this CMP be approved, to reapply for a permit to construct and operate the Outrigger Telescope Project in a resource subzone of a Conservation District in the Astronomy Precinct of Mauna Kea, there is no way that it could conform to this CMP either, because this CMP includes no land use analysis and no mention of the Astronomy Precinct at all."

When the Land Board met in Hilo on April 8 and 9 to hear testimony and take action on the CMP, Lemmo said Hara's decision was "largely one of the reasons why we're here today, the only reason." But his report to the Land Board was silent on whether or not the proposed CMP complied with Hara's decision. Lemmo recommended that the board approve the plan with several conditions requiring annual reports, board approval of all CMP amendments, and the retention of Land

Board authority over access, among other things.

Board member Johns observed that the university had taken the position that the CMP fulfills Hara's order, while Lemmo had not done so. Lemmo replied, "Not to dodge the question [but] I haven't looked at this plan in light of Hara. It was a narrow decision in the context of a Conservation District Use Permit. This CMP is not being submitted with a pending project."

Hara's decision aside, university president McClain said that if the CMP were approved, the OMKM would be responsible for implementation and that the university's Board of Regents would soon be voting on a commitment to finance the CMP. Office of Mauna Kea Management acting director Stephanie Nagata estimated this would cost about \$1.5 million a year.

Those testifying in support of the CMP included OHA, in a surprising turnaround, as well as representatives of each of the observatories on Mauna Kea, and the real estate, construction, and business communities, among others. All urged the board to approve the plan as an important step toward better management of Mauna Kea. Many also

sported black T-shirts emblazoned with the words, "Malama Mauna Kea" and wore yellow buttons saying "Mauna Kea CMP YES!"

Among the supporters was Ed Stevens of the university's Kahu Ku Mauna Council. "Currently, this urgently needed CMP sits before you, awaiting approval," Stevens said. "It's only part one of three major hurdles. The second hurdle is the critical need for 'rule making authority', which goes hand-in-hand with the CMP to properly manage the mountain. The third hurdle is acquiring funds for the staffing and implementation of the CMP."

Despite the show of support for the CMP, the board wanted more detail from the plan and attempted to get it via the four subplans.

As Marti Townsend of KAHEA: the Hawaiian Environmental Alliance wrote in her testimony, "How can a plan be considered 'all-inclusive' when it is intended as the first installment of a longer deliberative process, which purposefully leaves significant management questions completely unanswered? It can't."

Access

In its presentation to the Land Board on the need to restrict public access, university rep-

representatives showed pictures of graffiti on the mountain, cultural sites that had been knocked over, a truck off-roading in the snow, and bumper-to-bumper traffic on the summit access road. They also pointed out that archaeological surveys had identified 222 cultural sites in the science reserve, and an increasing number of "find spots" or stacked stones of recent origin.

The CMP proposes granting the Office of Mauna Kea Management authority to restrict access to protect Mauna Kea's resources, which include the rare wekiu bug, burial sites, Lake Waiau and Pu'u Ha'oki, among others. But planner Chang of Ku'iwalu said that any restriction would be subject to community discussion and that the rulemaking legislation currently being proposed would not give the university any more authority over access than what it already has under its lease.

Despite Chang's assurances regarding community consultation, Kealoha Pisciotto of Mauna Kea Anaina Hou argued against the CMP's proposal to have the university's Kahu Ku Mauna Council work with the community to determine culturally appropriate practices on the mountain.

"Having the university decide what is culturally appropriate is not appropriate," she said.

While some CMP opponents argued that the Land Board would be illegally delegating its authority to control access to Mauna Kea if it approved the CMP, Lemmo pointed out that one of the conditions of approval was that the board ultimately be responsible for controlling access.

"Control over access, native Hawaiian access, cannot be transferred to this plan," he said.

Should the Legislature pass a bill (pending at press time) to give the university rulemaking authority to manage and control public activities and access on Mauna Kea, the deputy attorney general advising the Land Board noted that such a delegation would not violate the *Kapa'akai vs. LUC*, a Supreme Court case that prohibits state agencies from transferring their responsibility to determine the effects on customary and traditional Native Hawaiian practices and the means to protect such practices. In the *Kapa'akai* case, the LUC had tried to delegate its responsibilities to a third party; in this case, the university is just another state agency, she said.

Natural and Cultural Resources

With regard to the cultural and natural resources plans initiated by the Office of Mauna Kea Management, some of those involved in their development complained that the recommendations contained in those plans had

been left out of the CMP because the university viewed them as too restrictive.

"This was the most likely reason that the detailed, and excellent, Natural Resources Management Plan prepared by SRGII, under contract to the University through OMKM, was omitted," said Fred Stone in written testimony to the board. "I was among a group of scientists invited to comment on the Natural Resources Management Plan when it was presented in November 2008. It was clearly intended that this plan would be included in the MKCMP. That it was not included implies that the university intends to keep their document vague and ambiguous so that they can avoid the responsibility of actually carrying it out in a meaningful way."

Board member Johns and board chair Laura Thielen asked university representatives how the OMKM plans fit in with the CMP. "If they're so integral, are we approving a plan that's incomplete today?" Johns asked.

Barry Taniguchi, president of the Mauna Kea Management Board, said he wanted the plans to be brought to the Land Board for inclusion into the CMP, while Chang said that the plans were not integral and were rather only informational documents.

Regardless of how they are incorporated, Ron Terry, a member of the Mauna Kea Management Board who helped initiate the natural resources management plan, said he believed that the CMP is generally consistent with the more detailed OMKM plans.

"I agree with, or do not disagree with, nearly all of its management recommendations," he said.

In the end, the Land Board chose to have some version of them included.

Decommissioning

While there was little public testimony regarding the decommissioning of telescopes, the Land Board chose to require a subplan to address it, since the lease does not and cannot be amended to require it. McClain said that while the university has not formally decided to decommission any of the facilities on Mauna Kea, there are a few sites where "we've begun to look at costs of taking them down at the end of their life."

Land Board chair Thielen told McClain that state leases often require bonds to cover remediation costs, and when she recommended that the board make a decommissioning plan a priority, McClain welcomed the requirement. In approving the CMP, the board stated that the decommissioning plan should include some kind of funding mechanism to pay for decommissioning.

'One stinking dollar'

Many of the those testifying in opposition to the CMP complained about the \$1/year lease rent, a rate the Land Board had often applied when leasing lands to other government agencies or non-profit organizations.

Citing news reports about Yale University's recent contract with the Caltech telescope operator to pay \$12 million for viewing time on the Keck telescope, they argued that the Land Board should renegotiate the lease rent to provide more money to the Office of Hawaiian Affairs, to the Hawaiian community, and to pay for better management of the mountain.

"One stinking dollar. Here's two. Give me the mountain," Paul Neves of the Royal Order of Kamehameha I told the board. Neves also requested a contested case hearing

Environment



Hawai'i

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and told the board, "We'll probably see you in court again."

Moanikeala Akaka added that the DLNR's recent proposal to start charging fees to enter certain state parks would be unnecessary if the Land Board only got more rent from the use of Mauna Kea.

"Why do you have to do an un-aloha thing – charging people to enter parks? Get that money out of the sacred coffers of the [university's] Institute for Astronomy," she said.

In discussing this issue with Lemmo, Land Board chair Laura Thielen pointed out that the lease does not allow the board to renegotiate the rent. In addition, UH's McClain said that the university does not make any money on its subleases and is compensated largely with telescope time. He acknowledged that telescope time has value, but added that the university had never attempted to "monetize" it. McClain said that while it may be possible to negotiate for money instead of some telescope time on future telescopes, current sub-lessees are under no obligation to renegotiate. He said that the university's scholarships and financial aid in support of native Hawaiian students exceeds \$2 million a year, which was a way of indirectly compensating Native Hawaiians for the use of ceded lands.

With regard to future subleases, McClain said, "the old days of \$1 rent and telescope time are gone."

At the end of the meeting, the board voted unanimously to approve a motion by Johns to adopt the CMP with several conditions. Big Island member Rob Pacheco recused himself from voting; O'ahu member Taryn Schuman was absent.



Board Waives Rent For Biofuel Plant

In November 2007, the Land Board granted a 35-year lease to Imperium Renewables Hawaii, LLC for 11 acres at Barbers Point Harbor, O'ahu, where the company proposed to build a biofuel processing facility. The company planned to turn palm oil into fuel, which it then would sell to Hawaii Electric Company. The board chose to waive Imperium's rent for the first year (starting February 1, 2008), since the company was planning to invest more than \$50 million into improving the property.

The economic downturn that occurred since the board's decision, however, has hampered Imperium's ability to obtain financing and to start paying rent, which became due on February 1. So at its March 27 meeting, the Land Board approved a recommendation from the Department of Transportation's Harbors Division to delay the start of the lease by one year – to February 1, 2009 – upon payment by Imperium of a \$100,000 fee. The board also added a condition to its approval that it could terminate the lease if Imperium fails to make any progress by January 1, 2010. Land Board member Tim Johns, who sits on HECO's board of directors, recused himself from voting on the matter.



Continued Closure Of Kahauale'a

At its April 6 meeting, the state Natural Area Reserves System Commission voted to recommend that the Board of Land and Natural Resources keep the Kahauale'a NAR closed for two years.

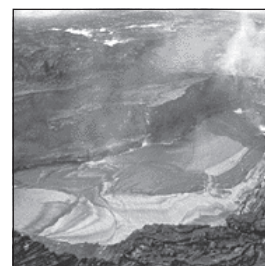
The Land Board voted in February to close the NAR until July 25, because Kilauea Volcano's Pu'u O'o vent had opened a series

of fissures in a popular hiking and hunting area in the lower third of the NAR. The NAR had been closed since last July, following recommendations from the Hawaii Civil Defense agency and the U.S. Geological Survey's Hawaii Volcano Observatory.

With the dangerous conditions unchanged, Big Island NARS manager Lisa Hadway asked the NARS commission last month to again recommend that the Land Board keep the reserve closed.

Richard Hoeflinger, the hunter representative on the commission, voted against the extended closure, arguing that the entire reserve did not need to be closed when only a third of it posed a danger to the public. Even if that were true, Hadway said that there is no practical way to physically close off a portion of the NAR to one user group while allowing access for another. "There's no question that I wish we could differentiate between user groups [but] it's very difficult to draw a line in the sand," she said. Since she was most concerned about visiting hikers, Hadway said she was willing to develop a special use permit to allow hunters to continue to access the NAR.

Deputy Attorney General Linda Chow added that with regard to the state's liability, "If there are naturally occurring cracks, you need to provide notice about the terrain, then there's no problem. In the case of lava flow, where the area is dangerous no matter how many signs you put up, it's a problem." She noted also that closing a portion of the NAR would raise enforcement issues that may not easily be dealt with. A special use permit for hunters "would probably work from the state's liability perspective, but not from the hunter's perspective," she said. — **Teresa Dawson**



Kahauale'a Natural Area Reserve

PHOTO: DLNR

