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The Skinny on Fat Tuna

Thunnus obesus – literally, fat tuna – has many other names, including bigeye and ahi. It is often described with superlatives: deepest diving, fastest swimming.

Add another superlative to the list: among the most species most vulnerable to overfishing.

There was really no argument on that point from any of the countries participating in the negotiations over bigeye allocations that occurred at the eighth meeting of the Western and Central Pacific Fisheries Commission. But none of the member states would give an inch to spare the tuna. Developing nations want the right to monetize the fish in their waters, even if it means ongoing bycatch of young bigeye in purse seine nets. Asian nations and the United States, on the other hand, refuse to see their catches as playing any role in the problem.

The commission opted to wait until its next meeting, in December, to change the dismal status quo. But will the fish wait, too?

That was a question the commission did not consider.

IN THIS ISSUE

Pacific Tuna Commission Cannot Agree On Meaningful Steps to Protect Bigeye

The Western and Central Pacific Fisheries Commission absolutely had to achieve one thing at its eighth annual meeting. That was to adopt a new conservation measure to address the serious overfishing of bigeye tuna occurring in waters under the commission's jurisdiction.

It failed.

The best it could do, given the fractious nature of its many members and their often contradictory interests, was to approve a one-year extension of the conservation measure it had adopted in 2008 to limit catches of bigeye and yellowfin. Intended to pare back bigeye fishing mortality to sustainable levels, the commission's Conservation and Management Measure (CMM) 2008-01 was supposed to achieve a 30 percent reduction in overall bigeye catches, with respect to average catches from 2001-2004, by the time the measure expired, at the end of 2011.

That, too, didn't happen.

According to a report from the scientists advising the commission, the limits CMM 2008-01 placed on purse seiners "have not adequately constrained total purse-seine effort," with effort in 2010 actually increasing by almost a third and total catches increasing 1.3 percent. "It would certainly appear at face value that the conservation and management measure [2008-01] has not been particularly effective in restricting total purse seine effort," John Hampton, head of the commission's Scientific Committee, told the assembled commissioners, national delegates, and observers at the commission's annual meeting, held in late April in Guam.

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A Honolulu-based longline vessel in port.

Environment Hawai'i

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NEW AND NOTEWORTHY

PHOTO: J.B. FRIDAY

Sandalwood *(Santalum paniculatum)*

Sandalwood at CITES? The U.S. Fish and Wildlife Service is considering whether to submit a proposal to add all varieties of Hawaiian sandalwood to the CITES Appendix II list, which includes species that may not now be threatened with extinction but which may become so unless trade in them is controlled. The proposal would be among several that the United States submits at the next regular meeting of the Conference of the Parties to CITES, to be held in Thailand next March.

In the April 11 *Federal Register,* the FWS invited comments on the proposals it had received for 92 specific taxa and two general groups (Asian freshwater turtles and six species of Hawaiian sandalwood). For Hawaiian sandalwood and 29 other species or groups of species of plants, fish, reptiles, birds and mammals, the *Federal Register* notice stated, the FWS was undecided whether to forward the proposals to CITES. For the remainder of species for which proposals were received, the notice goes on to state, the FWS is not likely to nominate them for CITES listing "unless we receive significant additional information indicating that a proposal is warranted."

The sandalwood proposal was put forward by United Plant Savers, a Vermont-based group that works to save species of plants with traditional and medicinal value. Recent reports of international trade in Hawaiian mountain sandalwood (*Santalum paniculatum*), the group stated in its proposal, raise "growing concern that unregulated international trade could affect wild populations." United Plant Savers is also assisting in the organization of a conference on sandalwood to be held October 21-24 at the East-West Center in Honolulu.

And Whitetip Sharks, Too: Among the other species that the Fish and Wildlife Service is undecided on is the oceanic whitetip shark (*Carcharhinus longimanus*), proposed for inclusion in either Appendix II or the more restrictive Appendix I, which generally prohibits international trade in the listed species. This shark was proposed for CITES listing in 2010, but was not approved then.

The International Union for the Conservation of Species (IUCN) has red-listed the oceanic whitetip shark as vulnerable since 2006. As noted in the article (in this issue) on the recent meeting of the Western and Central Pacific Fisheries Commission, the shark will enjoy some protections in the Pacific Ocean after January 1, 2013. Other regional fishery management organizations have already granted it protections elsewhere.

Stop the Seep! Earthjustice has filed a complaint in U.S. District Court against Maui County on behalf of four environmental groups seeking proper regulation of the discharge of wastewater from injection wells at Lahaina into the sea.

As *Environment Hawai'i* reported in February, recent results of tracer dye studies conducted by the EPA seem to confirm that wastewater injected into wells at the Lahaina Wastewater Reclamation Facility reaches the sea via freshwater seeps offshore of Kahekili Beach.

Because the county has neither applied for nor received a National Pollutant Discharge Elimination System Permit (NPDES) to discharge wastewater into the ocean, the groups ask the court to find that the county has violated and is violating the Clean Water Act. They seek fines (up to $37,500 per day per violation) and an order forcing the county to secure a NPDES permit for the injection wells.

David Albright, manager of the groundwater and underground injection control program for the EPA's Region IX in San Francisco, said earlier this year that it was too soon to determine whether the dye test results were enough to trigger a NPDES permit. He noted that preliminary monitoring results for pollutants at the seeps showed no sign of bacterial indicators, possibly because the county increased the chlorination of its wastewater last October.

As of last month, Albright had nothing new to report regarding test results, according to Dean Higuchi, EPA's press officer in Honolulu.

"While disinfection is a step in the right direction, it won't remove nitrogen and phosphorous from the wastewater, so it won't get rid of the harmful algae growth at Kahekili," Hannah Bernard of Hawai'i Wildlife Fund said in a press release. The Hawai'i Wildife Fund, together with the Surfrider Foundation-Maui Chapter, West Maui Preservation Association, and the Sierra Club-Maui Group filed the complaint against the county.

Quote of the Month

"We are the country that has closed the [bigeye tuna] fishery when we've reached the catch limit."

— Russell Smith, chief U.S. WCPFC negotiator

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EDITORIAL

The High Cost of Cheap Tuna

The 50 or so member states and participating non-members of the Western and Central Pacific Fisheries Commission can agree on very little. Yet when the commission's chaotic eighth meeting concluded after five long and raucous days of plenary sessions, with tempers flaring and the fragility of the convention itself on prominent display, there was near unanimity on one point: When it comes to keeping stocks of Pacific bigeye tuna from crashing, the commission has been a helpless, dysfunctional bystander.

And let there be no doubt: bigeye tuna are not merely approaching an overfished state. The approach ended some time back, while the commission's ineffectual 2008 conservation measure was in play. At present, the bigeye are well within the red zone, where urgent, meaningful action to rebuild stocks is essential.

Yet the commission could do nothing more than extend for less than a year the same tuna conservation measure that presided over the crash. That is better than nothing, but not by much. In some sectors regulated by the WCPFC, the take of bigeye has in fact increased in the three years that the limits imposed by the measure were in force. In sectors where the take has gone down, that reduction may not be a result of restraint on the part of fishers, but a reflection of a drop in the actual abundance of fish available to catch.

Why the paralysis?

In a nutshell, the fish are not being managed, or even regarded, as living creatures with life cycles that respond to environmental changes, but as economic commodities. Each delegation at the table is strongly motivated to maximize its share of an increasingly limited stock and minimize that of others.

Cue the Violins

The lengths to which the heads of delegation go to paint their concern for bigeye stocks in shades of purest white would be entertaining, if the situation were not so desperate. The chief U.S. negotiator, Russell Smith, for example, explained why the Hawai'i longline fleet should continue to enjoy its exemption from the 30 percent cuts foisted on most other member states, pointing out how scrupulously the fleet, subject only to a 10 percent reduction over its 2004 catches, abided by the commission's rules.

Smith wanted, he said, "to emphasize that this is a fishery where we have complied, put in place appropriate regulations, appropriate systems for monitoring the catch, so as we approach our limits, we shut down the fishery. So we have shut down this fishery on three occasions, because we took our commitment to honoring our catch limits seriously, and we wanted to make sure our fleet did not go beyond that.... We are the country that has closed the fishery when we've reached the catch limit."

Seriously? One can only wonder if Smith (or any other delegation head, for that matter) was aware of the shenanigans in 2011 that allowed the Hawai'i fleet to exceed its commission-imposed limits by more than 16 percent and which, for all practical purposes, allow it to fish in 2012 with virtually no limit at all.

Smith's heart-rending description of the fleet included the statements that it is a fishery "that is very important to the people of Hawai'i, their culture, their subsistence," and "90 percent – 99 percent of fish is consumed domestically." The notions that the longliners practice subsistence fishing and that they sell 99 percent of the catch locally, foregoing lucrative markets in Asia and the U.S. mainland – well, they make for a good story, but no one who has seen the frenetic bidding at the Honolulu fish auction, with Japanese buyers on the phone to their Japanese clients, would give it credence.

Hardly more credible were the efforts of Papua New Guinea's head delegate, Sylvester Pokajam, to depict his country and other South Pacific island states as weighed down by having to bear a disproportionate share of the economic burden accompanying bigeye conservation measures. PNG has allowed purse-seine fishing in its waters to increase exponentially, with each vessel paying handsomely for the privilege to drop its nets. The European Union allows tuna processed in PNG to enter its markets duty-free, almost certainly in return for concessions for European-flagged vessels. The head of the Japanese delegation, Masanori Miyahara, pointed out that Japan had spent some $400 million over the last five years to improve fisheries-related infrastructure in South Pacific island states, including construction of a fish market in PNG. In ongoing negotiations to renew the U.S. tuna treaty with South Pacific island states, Pokajam has been driving a hard bargain, with the United States now apparently prepared to offer $65 million for 9,000 days in which the U.S.-flagged purse seiners can fish in the region. (The current treaty is set to expire in June 2013.) PNG has exploited its rich tuna grounds for economic gain, often to the detriment of its own residents, displaced by cannery construction, and nearshore waters, polluted by cannery runoff.

Where To Now?

The commission ended its meeting with a promise by delegates to continue discussions over possible next steps to protect bigeye throughout the year, right up to the next commission meeting. (That is set to occur in the Philippines in December.)

Those discussions must include, at a minimum:

• **An end to exceptions:** The special pleadings, such as those by the United States, only make it more difficult to achieve equity and consensus. If the commission's scientific advisers say cuts of 30 to 35 percent from the present level of bigeye catch are needed, then everyone should labor under the same burden.

• **A limit to capacity:** To date, the commission has done little to control fishing capacity, given that the species targeted by purse seiners – skipjack tuna – seems to be in good nick. But with the purse seiners capturing so many juvenile bigeye, recommendations that purse seine capacity be limited should be heeded.

• **Increased enforcement:** The commission has adopted all kinds of measures intended to reduce the purse seine bycatch of bigeye, but, at the March meeting, the loopholes emerged. Many purse seiners don't carry observers, despite commission requirements. The ban on FAD sets for three months is undercut when vessels use lights to draw fish during the night. Illegal, unreported, and unregulated fishing is undoubtedly occurring, but without requirements for port state inspectors and other measures, it will continue – or, more likely, grow.

On its own, the commission may find it difficult to arrive at consensus. That's where intervention by an educated public may come into play.

Anymore, it is not enough that canned tuna be dolphin-safe. Consumers should ask whether it has been caught using methods that reduce bycatch of other species as well – and not just bigeye tuna, but whale sharks, cetaceans, and turtles.

The canneries that pack the tuna also

Overfishing from page 1

In the longline sector, which includes some 120 Honolulu-based vessels, provisional data suggest the bigeye catch for 2010 was roughly 23 percent lower than the baseline years of 2001-2004. "However," the scientists' report continues, "this estimate is based on incomplete data and is despite an increase in fleet size."

What's more, they go on to say, "reductions in catch may not necessarily correspond to reductions in fishing mortality." In other words, the numbers of bigeye are so low that catches will decline, not because of reduced effort, but simply because there are fewer fish. As Hampton noted, with characteristic understatement, this fact "is a somewhat negative point in terms of the assessment of the effectiveness of this measure."

Hawai'i's Special Case

A special exemption was carved out for the Hawai'i longline fleet. It had only to reduce its catch from a 2004 baseline by 10 percent in the first year the conservation measure took effect (2009) and hold it at that level the remaining two years. In practice, that meant holding its annual catches to no more than 3,763 tons, based on a catch of 4,181 tons of bigeye caught in 2004.

It didn't.

While the fleet kept within that limit in 2009 and 2010, in 2011, it continued to fish even after the limit was reached.

As readers of *Environment Hawai'i* may recall from our report in January, the Hawai'i longliners were expected to hit the 3,763-ton limit on November 27. Thanks to a well-timed act of Congress, they were allowed to continue fishing for bigeye the rest of the year, with all catch taken after the effective date of the act (November 18) attributed to American Samoa, no matter where it was caught. According to the National Marine Fisheries Service Pacific Islands Fisheries Science Center, total bigeye catch of the Hawai'i longline fleet came to 4,232 metric tons, with 608 metric tons caught on or after the date that the fishery would have closed absent congressional intervention. Far from a decrease over the 2004 baseline, the 2011 catch, in other words, represented an actual *increase* of 15 percent.

But the commission paid scant attention to the Hawai'i longliners, whose catch has recently accounted for 6 percent or less of the total longline catch of bigeye in the convention area, and an even smaller percentage of total bigeye catch by all gear types. For 2010, the total longline bigeye catch in the WCPFC area came to 64,953 metric tons. The total 2010 catch of bigeye from purse seiners, longliners, and other gear types came to more than 130,000 metric tons.

The Big Picture

The area under WCPFC's jurisdiction accounts for about 60 percent of all the tuna caught and consumed worldwide. When you add up total catches of all the varieties of tuna taken in the convention area – albacore, bigeye, skipjack, and yellowfin – by all the various types of fishing methods – purse seine, longline, pole-and-line, troll, and artisanal gears – the result approaches 2.5 million tons.

About 70 percent of the total catch is lower-value skipjack tuna. This is the target of most of the purse seine vessels, which supply canneries in Southeast Asia, Papua New Guinea, and American Samoa. Although the annual haul of skipjack in the Pacific has more than tripled since 1990, fisheries scientists maintain that the stocks of skipjack – small, fast-growing, and prolific – are still robust.

What caused the rise in skipjack catches to increase so substantially was the widespread introduction of man-made fish aggregating devices, or FADs, by purse seine fleets in the late 1990s. FADs take advantage of the tendency of tuna to congregate under floating objects, such as logs or even whale sharks. These aggregations include not just skipjack, but also juvenile yellowfin and bigeye as well as other non-target species, all of which are included in the haul as the nets are winched aboard the purse seiners.

As a corollary to the increased use of FADs, the catch of juvenile bigeye by the purse seine fleets also increased – to the point that in some recent years, the total weight of the purse seine haul of bigeye has been equal to or even greater than that of the longliners. But there is a significant difference in the size of the catches by the two types of gear. Most of the bigeye caught by purse seiners range in length between eight and 23 inches. That contrasts with an average length of 51 inches in the bigeye taken by the longliners. In other words, many times more bigeye are taken by purse seiners than by longliners, even though, by weight, the takes of the two gear types are not that far apart.

This helps explain why, in discussing how to conserve and rebuild the bigeye stocks in the convention area, so much attention is paid to purse seiners, even though they do not directly target bigeye. CMM 2008-01, for example, calls for a three-month ban on purse-seine sets on FADs and limits on fishing effort, in addition to the restrictions on longline catches.

Despite the constraints, purse-seine effort has increased in recent years. As Hampton noted, from 2001 to 2004, the average number of vessel days in the WCPFC area (days when a purse seiner is actively fishing) was 39,559; by 2011, it was 57,500, an increase of 31 percent.

> *"We have been seeing problems in the FAD closure, and 100 percent observer coverage is not 100 percent, actually."*
>
> ***— Roberto Cesari, WCPFC***

At the commission meeting, both the European Union and the United States supported changing the three-month ban on FAD sets to a three-month closure, noting that this would eliminate enforcement problems.

"It's a question of having a much more effective possibility of enforcement of these measures," said Roberto Cesari, head of the EU delegation. "We have been seeing problems in the FAD closure, and 100 percent observer coverage is not 100 percent, actually."

Countries with tuna canneries objected, arguing this would cause an intolerable disruption of their supplies. Although proponents of the total closure suggested that it could be done in a rolling fashion, so that cannery deliveries would be uninterrupted, the proposal never gained much traction.

High Seas Pockets

One element of CMM 2008-01 that was not renewed was the closure of two high-seas

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should be scrutinized. Are workers treated fairly? Are coastal waters, often the chief source of protein for nearby residents, being impaired by cannery operations? Are the canneries themselves operated in a sanitary fashion?

Getting answers to these questions may not be easy, but it is imperative that consumers begin to educate themselves about the high cost of cheap tuna. It may not be enough to bring bigeye back, but it may give commission members enough spine to start behaving in the best interests of the resource rather than their fishing-industry constituents.

pockets – "doughnut holes" of international waters surrounded on all sides by exclusive economic zones of Pacific island states – in the western part of the convention area. Some conservation groups – notably Greenpeace – maintain that such closures constitute marine reserves and call for their expansion to other areas of the high seas.

However, Hampton, of the commission's Scientific Committee, was skeptical about the effectiveness of the pocket closures as a conservation measure for bigeye, since it appears that much of the fishing effort that would have occurred in the pockets has simply shifted to neighboring territorial seas. "What we've seen," he told the commission, "is probably the effort has gone into the EEZs. It's difficult to make an argument that the high seas closure has had a conservation benefit."

The commission opened up the more westerly of the two pockets to fishing by 36 Philippine purse seiners, in hopes that it would relieve pressure on spawning stocks in the Philippine territorial seas. Although technically the pockets are open to purse seiners from other countries, it is unlikely many will be fishing there. Under conditions imposed by the coalition of island states that control most of the skipjack grounds in the South Pacific – a group known as the Parties to the Nauru Agreement – purse seiners that want to fish in their territorial seas may not fish in the high seas pocket areas as well.

PHOTO: ROBIN W. BAIRD/WWW.CASCADIARESEARCH.ORG

Whitetip shark

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Limited, Delayed Protection For Whitetip Sharks, Whales

One issue on which the commission did agree was a proposal to increase protection of oceanic whitetip sharks. Keith Bigelow of the NMFS Pacific Islands Fisheries Science Center in Honolulu presented a report showing a 90 percent decline in the relative abundance of this species in Hawai'i longline catches from 1995 to 2010.

Since 2006, the International Union for the Conservation of Nature has listed the species as vulnerable. "Its large fins are highly prized in international trade although the carcass is often discarded," the IUCN notes. Not surprisingly, most of the Asian countries, where shark fins are still a delicacy, did not go along with the initial U.S. proposal.

The head of the Chinese delegation objected to managing sharks on a species-by-species basis and also challenged the language to ban the sale of whitetip sharks from vessel decks, noting that it was very difficult to keep fishermen from doing this.

The chief Japanese delegate also indicated that his country was disinclined to go along with the proposal as well. "I talked with many parties, including NGO [non-governmental organization] observers," said Masanori Miyahara. "I tried to persuade headquarters the last three days, and finally came up with a solution that was fortunately accepted by all parties."

That solution involved eliminating the ban on "selling or offering to sell from on board a fishing vessel … any oceanic whitetip shark, in whole or in part." However, the final version still prohibits the landing of oceanic whitetip sharks.

And while the measure is to be "amended if appropriate at the 2012 Commission meeting," it does not enter into force until January 1, 2013.

A similar start date was included in the measures intended to protect whales and whale sharks from purse seine operations. The head of the Australia delegation noted that the proposals were based on recommendations from the commission's Scientific Committee and had been initially brought forward two years ago. "This is an issue of ongoing concern," she said, "and is drawing increasing attention and criticism by the international community."

The proposals, which were introduced by Australia, "do two things," she continued. "They ban the deliberate setting on whale sharks and cetaceans, and, because we know from discussions with industry and observer reports, it's not always detectable when a whale shark or cetacean is present, both proposals do a second thing: they require steps be taken to allow the safe release of encircled animals."

The United States supported the proposals, with the head of delegation, Russell Smith, observing, "We have had for over 25 years now bans on the intentional setting on cetaceans … It is a violation of U.S. law to set on either a live or dead whale… The issue of whale sharks has emerged more recently, and it is also a very important element in terms of ecosystem management in the Western Pacific. We are very much in support." Other commission members from South Pacific states, where whale shark tourism is a growing industry, endorsed the Australian measures.

Japan did not. Miyahara said his delegation supported the "spirit" of the proposal; "as far as Japanese crews are concerned, nobody wants to hurt a cetacean or whale shark."

"Our difficulty is enforceability," he continued. "From the perspective of enforcement, it is impossible to identify which is intentional or which is not an intentional operation." His delegation had proposed an alternative measure calling for guidelines to minimize injury to encircled whales and whale sharks, "and we are very serious to work with other parties to solve this issue, but unfortunately the Australian proposal doesn't work from our perspective." China seconded Japan's concerns.

Sylvester Pokajam, the outspoken chair of the PNA coalition and head of the Papua New Guinea delegation, reminded the commission that "the PNA group have already implemented a prohibition on intentional setting on whale sharks as a condition of fishing in

our EEZs, which is the vast majority of the fishery… Refusing to protect these animals in the small remaining part of the region would be inconsistent with convention provisions [requiring compatibility between fishing regulations within and outside EEZs] and would transfer a disproportionate conservation burden on us."

By the fifth and last day of the commission's meeting, Australia had managed to address the concerns over intentionality raised by Japan and had revised the measure addressing cetaceans so that, as with the oceanic whitetip shark measure, its effective date was January 1, 2013. With those revisions, the measure was adopted.

But the Japanese stood their ground on the whale shark measure, even though Australia had revised it along the same lines as the proposal for avoiding whales. Miyahara thanked Australia for its efforts, but, he added, "Unfortunately, we are not in a position to say yes to this document at this meeting… We will be ready to discuss and hopefully agree on this proposal in December [at the next WCPFC meeting], but at this moment, I cannot."

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American Samoa-Hawai'i Deal Not a Charter, NMFS Says

One of the most important tasks facing WCPFC is to capture data on the amount of fish taken. Given the various arrangements that many of the member states have with foreign-flagged fleets, this is not as simple as one might think.

Does the catch of a foreign vessel fishing under a charter arrangement with, say, Papua New Guinea report its catch through its flag state? Or does Papua New Guinea report the catch, since the vessel is part of its program to develop its own fisheries program? Either way, it's vital to the commission's business that the catch be reported accurately and in timely fashion.

To address this issue, in 2009, the commission adopted a measure requiring the chartering nation or territory to provide the commission with information on each vessel with which it has a charter arrangement. The notice, which is also to be sent to the flag state, is to be made within 15 days of the arrangement going into effect – and never less than 72 hours in advance of the start of actual fishing by the charter vessel.

The charter notification measure was to have expired on December 31, 2011, but was extended at the commission's March meeting for one year.

But how does it apply? Specifically, does it apply to the charter arrangement that the Hawai'i Longline Association entered into with the government of American Samoa last November?

According to an email from Mike Tosatto, the head of the NMFS Pacific Island Regional Office, "there is a lack of clarity and agreement on what constitutes a charter and who is responsible for what in a charter situation."

"For the time being," Tosatto said, "only the 'charters' that are easily definable are being notified to the commission. There are many situations that are not so clear, including some U.S. activities in the region…. We do not believe any of the U.S. situations constitute a 'charter' under the notification CMM."

The language in the congressional act allowing the American Samoa-HLA agreement refers specifically to the WCPFC and its provisions allowing "participating territories" (which would include American Samoa) to "use, assign, allocate, and manage catch limits" of highly migratory species. It also requires the Secretary of Commerce, in annual reports to WCPFC, to attribute catches by vessels fishing under such an arrangement to the participating territory.

"I don't think we've ever said this is a charter," Tosatto said in a phone interview. "We're clearly saying this is an arrangement between American Samoa and the Hawai'i Longline Association … that allows American Samoa to assign a level of their quota and which then requires us to report catch under that arrangement to the WCPFC. That does not equal a charter, as we currently understand what a charter is in the WCPFC."

> *"I don't think we've ever said this is a charter."* ***— Mike Tosatto, NMFS***

Nothing in the WCPFC convention defines a charter. However, the conservation and management measure addressing charter notification does – at least indirectly – and in a very broad way. The provisions of the measure, it states, apply to members and participating territories "that charter, lease, or enter into other mechanisms" with vessels flagged to another state for the purpose "of conducting fishing operations in the convention area as an integral part of the domestic fleet" of the chartering entity. Similar language appears in the congressional act: "Vessels under such arrangements [as the one with American Samoa] are integral to the domestic fisheries of the U.S. participating territories."

The HLA-American Samoa arrangement, Tosatto told *Environment Hawai'i*, "is more of an internal U.S. accounting exercise, not a charter between two countries as it's understood…. In our assessment, it falls outside of our requirement to notify the commission of charters."

Still, Tosatto says, the United States was preparing to submit to WCPFC a report on the U.S. bigeye catch for 2011 that attributes to American Samoa that fraction of the longliners' haul caught after the new law kicked in.

That quantity will make up the "third piece," Tosatto said, of the American Samoa reported bigeye catch. First is the amount of bigeye hauled in by American Samoa fishers and landed in the territory. Second is the amount of bigeye caught outside the territorial waters of the United States by Hawai'i-based vessels holding American Samoa permits as well as Hawai'i permits. Their catch has traditionally been assigned to American Samoa. And the third piece is the tonnage landed in Honolulu by Hawai'i longliners after November 18.

"You'll see a statistical bump in the American Samoa catch for 2011," Tosatto said. In past years, the average American Samoa catch landed in the territory was 173 metric tons. The dual-permitted catch for 2011 (none of which was landed in American Samoa) came to 464 tons. With the addition of the 652 tons caught by Hawai'i longliners from November 18 to the end of the year, the American Samoa reported catch is more than doubled from previous years.

Apples and Oranges

The United States is also exploring what some might call a nuanced position with respect to overfishing of bigeye in the Pacific. Most of the Hawai'i longliners operate in region 2 of the convention area – generally the northeastern quadrant – with a small fraction of the catch coming from region 4.

"We're looking at the Hawai'i longline fishery," Tosatto said, "and trying to gain traction on the idea that our adult bigeye fishery is not having the same impact on the stock like the purse seine fishery, which is taking bigeye juveniles."

"It's an apples-and-oranges issue," he continued. "A freezer longliner fishery, taking smaller fish from a problem area – it might be appropriate that they take a larger hit," in terms of their allowed catch limits.

"In the long run, it's all about what impact our fishery is having, and whether it is demonstrably a lesser impact."

— Patricia Tummons

REVIEW

Challenging the Dogma of MSY

Carmel Finley.
All the Fish in the Sea: Maximum Sustainable Yield and the Failure of Fisheries Management.
University of Chicago Press, 2011. 224 pages. Cloth: $35.00.

"MSY: A quantity that has been shown by biologists not to exist, and by economists to be misleading if it did exist. The key to modern fisheries management."[1]

In the lingo of fisheries management, M-S-Y is G-O-D. To attain maximum sustainable yield is to attain a kind of watery nirvana. It is, in theory, the Goldilocks point at which the population of targeted fish is neither too low (threatening a decline in catch) nor too high (representing a waste of fish that could otherwise be sold and consumed), but just right.

Or, as historian Carmel Finley puts it in her new book, *All the Fish in the Sea,* "some scientists after World War II believed that fishing had a positive impact on fish, removing older, slow-growing fish to free food supplies to support large numbers of faster-growing young fish. They believed they could estimate how many fish could safely be harvested." She quotes Wilbert McLeod Chapman, the State Department employee in the post-war period who, more than anyone else, inserted MSY into fishery management treaties: "Fishery resources, being quickly replaced by nature, are wasted if the annual crop which can be safely harvested from them is not taken. The fish mature, die, and are lost to the benefit of no one."

If MSY is God, the high priests of the religion are the fisheries scientists. Their arcane and mystifying calculus is displayed in power-point presentations on giant screens at every gathering of the congregation, as the scientists inform the benighted congregants of the status of stocks.

Finley, a professor of history at Oregon State University, is a heretic. In her book, she reviews the events and disputes – diplomatic, social, economic, political – that lie behind the emergence of MSY as a kind of gold standard for rational fisheries management. "MSY became part of American foreign and domestic policy in 1949," she notes, "when it was formally adopted by the State Department as the goal of American fisheries policy."

"Between 1949 and 1958, American diplomats pushed to have MSY adopted internationally as the goal of fisheries science. MSY is the basis for many of the international fisheries agreements signed during the 1950s, and it was formally recognized as a legal concept during the Law of the Sea negotiations in 1958." Though modified somewhat in 1996, with passage of the Sustainable Fisheries Act, she continues, "it is still at the heart of modern American fisheries management."

MSY fit well with a laissez-faire, free-market approach to commercial fishing, Finley explains. If MSY was exceeded, the theory went, then it would become unprofitable for fishermen to pursue the stock. With fishing pressure relieved, stocks could rebuild, to the point it was once more profitable to fish for them. Along with that came a blind faith in the ability of fish to bounce back from overfishing: "Chapman," Finley writes, "believed in the essential resilience of the fish themselves, despite the pressure of sustained fishing. Till his death in 1970, he believed that fishing did not overharvest stocks; he was not alone in that belief."

One of the fundamental tenets of MSY is the notion that fish have surplus production that can safely be harvested (i.e., fished); "when the catch per unit effort (CPUE) dropped," Finley says in describing this view, "fishing would halt and the stocks would be given time to rebound to optimal levels. Introducing restrictions as the catch was increasing was not necessary. The fishery could regulate itself."

However, she continues, "while surplus production theory purported to be based on biology, it rested on an economic trigger: a decline in the CPUE."

"The whole biological-economic model presumed that markets were open, when, in fact, they were not. After 1945, governments increasingly subsidized the global fishing industry, creating new programs to build boats and processing facilities, funding university work on the development and marketing of new fish products, and implementing tariffs and other protective measures.

"When fish catches fell, the economic incentive to leave the industry was neutralized by government actions. If anything, once government spending was established, subsidies continued, creating the pressure for more assistance and continually thwarting the expected corrective action of the markets."

The adoption of MSY as a regulatory standard did not occur without dissent. A British fisheries scientist, Michael Graham, took strong exception to the notion that human fishing effort was equivalent to just another type of natural predation. If "one agent of death becomes so active as to claim more fish than die by all other agencies together, then that agent has control of the average age of the stock of fish," Graham wrote in a paper presented to a critical United Nations conference on fisheries management held in Rome in 1955. Graham, Finley writes, advocated a "go-slow approach that sought to achieve long-term economic benefits for fishermen, by protecting young fish from exploitation until they were older, larger, and had spawned. Today it is tempting to call Graham's proposals precautionary, but Graham … was motivated not so much by the desire to protect fish as the desire to protect fishermen. Protecting fishermen would also protect fish."

Graham's objections were ignored, as were those of Sydney Holt, another fisheries scientist (still living today). Holt, Finley writes, was arguing that MSY encourages the development of a large fishing fleet, which increases expenses to fishermen, who, in turn, generate heavy political pressure on governments to allow continued fishing. "Holt argued against research aimed at estimating a 'critical point' for ocean fishery management," she writes. "If fishing was focused on harvesting the maximum catch at its maximum weight, this could only be done by a large number of boats or 'with an infinitely high fishing intensity and hence at a correspondingly high cost; it is therefore a *totally unreal objective for resource use.*"

Nonetheless, MSY became the order of the day in international fisheries management regimes, but scientists could not keep pace with the rapid development of post-war fisheries. "[T]he entire world of fishing was accelerating, as more government and private money was being poured into the industry," Finley writes. "The peculiar postwar activity of fishery development had already emerged, with its strong political ties to government and its economic implications for fishermen. Fishery science was only one component of post-war fishery development, and the suggestion that fishing proceed slowly and cautiously did not fit with the post-war objectives of staking claims to new fishery resources."

Not surprisingly, the second half of the 20th century saw fisheries crash: Atlantic cod, California sardines, salmon in the Pacific Northwest, Peruvian anchovies, South

1 Quoted by Finley, who attributes it to John Gulland (1920-1991), a British fisheries scientist.

BOARD TALK

Limu Stewards Oppose Plan To Alter Sand Berm in 'Ewa

Limu gatherers are once again challenging drainage improvements proposed for the mouth of Kaloi Gulch in 'Ewa, O'ahu. But this time, they aren't just up against Haseko ('Ewa), Inc.

The Department of Hawaiian Home Lands, the University of Hawai'i-West O'ahu, and the City and County of Honolulu's Department of Planning and Permitting have joined the Ocean Pointe developer in filing a Conservation District Use Application to lower a natural berm at One'ula Beach Park that blocks runoff from flowing to the sea. They say lowering the berm by two to four feet would still allow it to function as a filter, but it would also prevent flooding during 10-year storm events. Without such an outlet, Kapolei will have a harder time becoming O'ahu's second city, they say.

But for native Hawaiian cultural practitioner Michael Kumukauoha Lee, who successfully fought a similar proposal by Haseko in 2007, developers can and should minimize urban runoff by building vertically rather than horizontally and by constructing retention/detention basins on their properties. Simply allowing runoff from the 10-mile gulch to drain, unfiltered, into the ocean, will harm 'Ewa's famed limu beds, he argued.

On March 23, the state Board of Land and Natural Resources sided with the developers and approved their request for a Conservation District Use Permit.

In response, Lee and Native Hawaiian Legal Corporation attorney Alan Murakami asked for a contested case hearing. NHLC is representing another limu gatherer, Henry Chang Wo.

Roadblock

Up until the early 1990s, much of the land within the Kaloi Gulch Drainage Basin had been used to grow sugarcane. And according to testimony Haseko consultant Nelson Lee gave to the state Land Use Commission in 2007, "Because of the plants and soil, surface flows were generally absorbed through infiltration and didn't reach the ocean." Storm water runoff through Ocean Pointe was only about 550 cubic feet per second (cfs), he said.

Urbanization changed that. In November 1996, heavy rains flooded the 'Ewa Villages development so badly that the city tasked a group of engineers with devising a plan to address the storm water runoff that was expected to accompany increased urbanization within the 7,500-acre basin.

The engineers decided to limit runoff into Kaloi Gulch to a total of 2,500 cfs and, to date, developers have accomplished this using retention/detention basins, primarily in the form of golf courses. The 2,500 cfs limit would remain until an ocean outlet large enough to accommodate 100-year storms was constructed.

As part of its Ocean Pointe/Hoakalei development, which occupies most of the land at the mouth of Kaloi Gulch, Haseko shouldered the burden of designing and constructing drainage improvements that could accommodate all of the basin's runoff. Haseko had originally planned to divert the runoff into its proposed marina at Hoakalei, but abandoned the idea after the city raised concerns that the drainage improvements might somehow damage a sewage outfall that runs beneath the marina.

Instead, Haseko looked to One'ula Beach Park, which is owned by the city but is surrounded by the Ocean Pointe development. Haseko sought a Special Management Area permit from the city and a Conservation District Use Permit from the state Department of Land and Natural Resources in 2007 to widen the gulch and lower the sand berm at the park. (Currently, the channel can accommodate 4,200 cfs. City standards require it to handle a 100-year storm peak flow of 8,100 cfs for it to be considered a permanent outlet.)

"If this berm is not lowered, flood waters will reside at the park and eventually the backwater may flood the park, homes in the older 'Ewa Beach neighborhood and some of the homes at Ocean Pointe," Nelson Lee told the LUC.

And unless the ocean outlet is developed, "some land that UH [West O'ahu] wants to

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American pilchards, Georges Banks herring, California rockfish – the list goes on and on.

"It is generally argued that MSY was a step forward in recognizing that the great sea fishes were exhaustible," Finley writes in her conclusion. "However, I argue the opposite. MSY, as it came to be implemented, created a false sense of security in the minds of the public and politicians. In a sense, fisheries science was frozen in 1955 by the actions at the Rome meeting. There have been various modifications of MSY, replacing the word 'maximum' with other words, such as 'optimum' or 'economic,' but the modifications have not been substantial enough to prevent fish populations from being overly exploited."

In the last half century, as stocks have collapsed, efforts to tweak MSY to reflect more complicated realities have caused the fisheries scientists' equations to become ever more abstract.

"The biological complexity around the reproduction of fish stocks in the oceans has been a much more confounding puzzle than early biologists suspected," Finley writes. "Once the policy was established that the goal of management was to predict how many fish could be caught, the science was pushed into ever more complex mathematical models, increasingly divorced from the real world of what was happening in the water."

What Finley argues for is nothing less than turning the hoary principle of MSY on its head: "The story we have always told about all the fish in the sea is that there are many of them. They are renewable, they can sustain heavy fishing pressure, and the ocean they live in is resilient and productive. Instead, our twenty-first-century story of all the fish in the sea is that they must be valued and husbanded. They platy a vital environmental role in the ocean; they must be protected so they can replenish and strengthen their population structures, and the ocean itself must be treated with greater understanding for its fragility and its limits."

I fully expect the views of Finley, like those of the Anabaptists, to be disparaged by many of the scientists who have built their entire careers on divining MSY. She isn't one of the initiates, after all, and there appears not one quadratic equation in her entire book. But for all that, her message deserves to be heard. Given the colossal failures in managing stocks of fish – collapses that are ongoing and which will, in all likelihood, only grow more frequent in the future – it is imperative that a new standard for fisheries management be developed. Finley's heretical views mark an important milestone in that direction.

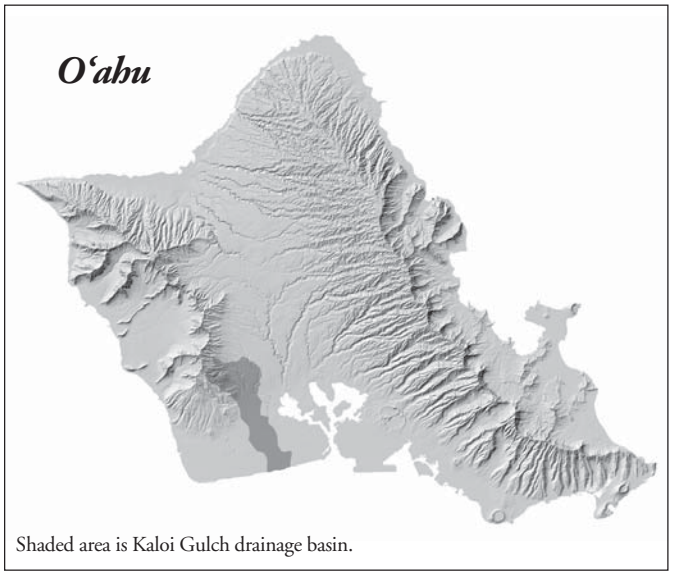
— Patricia Tummons

ultimately develop has to be set aside for a time for storm drainage facilities," he said.

When asked what the alternative might be should either the SMA or the CDUP be denied, Lee said, "The only real alternative is for each of the projects in the drainage basin to provide enough retention and detention infrastructure within their developments to limit the amount of channelized flows that exit each of their makai boundaries, just as the current developments have done without an ocean outlet."

The city granted Haseko a SMA permit in July 2007. That same month, the Land Board was set to decide on Haseko's CDUA, but the NHLC, representing Michael Kumukauoha Lee, requested a contested case hearing. As a result of the request, the Land Board took no action and no further testimony on the permit application.

Hearing officer Lawrence Miike, a former director of the state Department of Health and member of the state Commission on Water Resource Management, conducted a contested case in 2008. In January 2009, upon Miike's recommendation, the Land Board denied the CDUA. It found that Haseko had not proven that the project was necessary. With the proper infrastructure, urban runoff could be contained within individual developments, the board found.



Shaded area is Kaloi Gulch drainage basin.

CREDIT: WATER RESOURCES RESEARCH CENTER

> *"This is a key component of continued development of Kapolei as a second city."*
> ***— David Tanoue, Director***
> ***Department of Planning and Permitting***

Round Two

Nearly two years later, after the city had a chance to revise its development plans to designate One'ula Beach Park as the outlet for Kaloi Gulch, Haseko, UH-West O'ahu, the DHHL, and the Honolulu Department of Planning and Permitting applied for a CDUP for the Kaloi Gulch drainage improvements. The permit would cover work on about half an acre of state land makai of One'ula Beach Park. Representing the applicants was SSFM consultant Dean Uchida, a former administrator for the DLNR's Land Division.

"New information shows that future development within the Kaloi Gulch drainage basin will be significantly restricted without the proposed drainage improvements at One'ula Beach Park," wrote DLNR Office of Conservation and Coastal Lands planner K. Tiger Mills in her March 23 report to the Land Board.

At the Land Board's March 23 meeting, OCCL administrator Sam Lemmo said his office supported the project because it is not a channelized culvert box system that cuts to the shoreline and affects access and beach processes.

"This [berm] is more of a natural feature," Lemmo said. "At the end of the day, we believe [the landowners] deserve to address you again, state their case, see if the project can continue. From our perspective, we prefer these types of improvements over culvert box type improvements," Lemmo said.

Uchida noted that the Kaloi Gulch situation is unique in that a group of landowners within the drainage area together devised a solution to their flood control issues.

"The project will allow lands UH-West O'ahu and DHHL set aside for drainage to be reduced, a savings of eight to 11 acres of land at UH-West O'ahu," Uchida said. He added that the state Department of Transportation has indicated that, at some point, it will turn all of its land around North-South Road, which includes a detention pond, over to the DHHL, which has two developments planned for its lands in the area.

> *"I want to ensure in 20 years, this was not the point at which 'Ewa turned into another impervious [city] and land and sea were destroyed by it."* ***— Sam Gon, Land Board***

"If we can reduce size of the retention basin at North-South Road, DHHL will gain. ... That was the difference between the last proposal and this proposal. That's why there are so many applicants," he said.

UH-West O'ahu vice chancellor Donna Kiyosaki also testified in favor of the project. The campus currently has more than 22 acres of retention basins, but if the 2,500 cfs limit is lifted, the university could cut that down to about 11 acres, she said.

"For UH-West Oahu, our land is our asset," she said.

For Sandy Pfund, DHHL's land development division administrator, the decision to become a co-applicant was considered very carefully to ensure it was culturally appropriate.

"By and large, we felt it would be fair to go forward with the improvements," she said, adding that the Office of Hawaiian Affairs had indicated that it was not averse to DHHL's participation. Whether or not the project will harm the seaweed native Hawaiians use in their cultural practices is debatable, she added.

"We have over 1,000 homesteads. Retention basins will not be taken away; those are for water quality. It's just that with more improvements downstream, more land could be made available," she said.

City DPP director David Tanoue also downplayed the project's potential environmental impacts, noting water is likely to breach the berm only during a "significant, catastrophic storm event."

"You know water is going to have that kind of runoff from other outfalls," he said.

"This [project] is a key component of continued development of Kapolei as a second city," he said.

Saving the Seaweed

Key to Kapolei or not, Michael Kumukauoha Lee warned the Land Board, "If you do approve this, I will stand up for a contested case to do this dance one more time."

"When you take out the natural sand, you take out the natural filter," he said, adding that limu in 'Ewa is diminishing. He also referred to a study by Florida marine scientist

Brian Lapointe presented during his 2008 contested case hearing, which showed that invasive species of limu thrive with the high nitrate levels.

Funneling more runoff into the ocean will create a bloom of invasive limu that will destroy native limu, Lee said. And "according to the constitution, you don't play around with Hawaiian practices and health," he said.

The Land Board has a duty to investigate cultural practices in the project area, as well as the impact the project might have on those practices, the NHLC's Murakami explained. What's more, he said, "every agency is supposed to reasonably protect those practices from harm. ... So far from what I've heard, there can't be that because there aren't the first two things."

Chang Wo said directing urban runoff to One'ula Beach would pollute the only beach in Kaloi Gulch and cause irreversible damage.

"The ocean needs to drink as you and I need to drink, [but] as with any plant, it's water quality [that's key]," he said. "If you don't watch the 'aina, you're going to lose what you have in the ocean."

The idea of trading the viability of a reef for a few acres of developable land puzzled Murakami.

"Why can't there be other lands [to collect runoff]? Why can't it be a golf course, rather than a reef that you have a public trust duty to protect?" he asked the board.

To this, Kaua'i Land Board member Ron Agor argued that today's runoff is less harmful than what came off the land during the sugar plantation era.

"I know for a fact the runoffs of the sugar land is far worse than it is today. ... I worked in the sugar industry," he said.

Lee, however, pointed out that the sugar plantation in 'Ewa was different from others.

Because 'Ewa is so porous, even heavy rains would percolate into the soil, he said, adding that any ponded water would be filtered by sand before it reached the ocean.

"When you put asphalt and concrete, it can't do that anymore. You're increasing the volume into a narrow parameter," he said.

Deliberation

"You're in a difficult situation," Lemmo told the board. "What you do can affect state and county plans for planned development of the West O'ahu area. ... We felt our recommendation [to approve the permit] was the best we could do for this board and this public. Like I said, it's a natural berm. It doesn't appear that it's going to be overtopped frequently."

Land Board members David Goode and John Morgan also noted that overtopping was projected to occur only when the island received eight inches of rain in a day. And with that much rain, runoff is going to come from everywhere, not just Kaloi Gulch.

"With eight inches, there's a lot going on" in terms of runoff, Goode said.

"In a 10-year storm, the whole coast is brown," Morgan added.

"From my perspective, it's a reasonable project," Morgan said.

At-large board member Sam Gon was also supportive, but warily so.

To the applicants, he said, "You're going to run into major problems of this sort, which are likely to increase over time," and the nature of the area's drainage will have been radically changed.

"The water is no longer percolating and coming slowly out through the system. Instead it gets channeled. This is symptomatic of a larger issue over the entire watershed. If we're really going to be concerned about this kind of thing, we really have to bolster not only the mitigative response, but really think hard about those kinds of things," he said.

"There's always that hard push for using lands against what the natural system relies upon so there is the correct interchange of nutrients from land into sea. ... The lowering of a berm is a tiny bit of that," he said. "I really implore you to take second, third, and continual looks at drainage. ... Otherwise, it will become that impervious drainage, as we've got in Honolulu. ... I want to ensure in 20 years, this was not the point at which 'Ewa turned into another impervious [city] and land and sea were destroyed by it."

Over Murakami's objections that the Land Board could not legally proceed in the face of a request for a contested case hearing, the board unanimously approved the permit.

"I'm a firm believer in engineering standards. ... Whatever water that is going to be released will be free of chemicals," Agor said.

⁂

Hawaiian Group Seeks to Halt Maui Telescope Construction

To Native Hawaiian Legal Corporation attorney David Kimo Frankel, what the University of Hawai'i is doing is just crazy. And he's not going to stand for it.

On April 10, University of Hawai'i Institute for Astronomy assistant director Michael Maberry informed the state Department of Land and Natural Resources' Office of Conservation and Coastal Lands that it planned to begin construction of the Advanced Technology Solar Telescope (ATST) on the summit of Haleakala on May 14. This, despite the fact that the university is in the midst of a contested case hearing with the native Hawaiian organization Kilakila 'O Haleakala — which NHLC represents — over the Conservation District Use Permit for the telescope, approved in December 2010.

CREDIT: NATIONAL SOLAR OBSERVATORY

A rendering of the ATST at the Reber site.

The university apparently failed to notify Kilakila 'O Haleakala of its decision. The group, which is dedicated to protecting Hawaiian cultural sites, was disappointed.

"I'm very concerned that the university would do this when the Board of Land and Natural Resources has not issued a decision in our contested case hearing as to whether the university should even be allowed to build a fourteen-story telescope at the very top of Haleakala," Kilakila 'O Haleakala president Ki'ope Raymond said in a press release.

Frankel called the move unprecedented and insulting.

"The university is trying to bulldoze its project through without regard to legal requirements, the impacts to Native Hawaiians, or the consequences to the National Park," Frankel said, arguing that a developer cannot start building before the Land Board decides whether the development should be permitted.

He added that the contested case hearing process had already been "indelibly tainted" by pressure on the former hearing officer for an expedited decision from U.S. Sen. Daniel Inouye's and Gov. Neil Abercrombie's offices. The former officer, Steven Jacobson, and his recommendations to the Land Board were dismissed last month by the board after it found he had improperly communicated his concerns about the alleged pressures to the University of Hawai'i.

On March 29, the Land Board decided to appoint a new hearing officer to draft new recommended findings of fact, conclusions of law and a decision and order. The board gave the officer a mere two months after being appointed to complete the job., The university could not wait that long and decided to proceed with two projects that would shrink the university's current presence on the mountain, while making space for the ATST.

Over eight weeks, the university plans to remove the concrete foundations at an early 1950s remnant known as Reber Circle, then level the site. It also plans to remove boulders along Reber Circle Road and an asphalt parking lot and to dig a utility corridor so power lines between two adjacent facilities can run underground. Total cost for the work is $1.5 million, according to UH associate vice president Lynne Waters.

To Frankel, even such preliminary work is unacceptable.

Last month, the NHLC filed a handful of motions in 1st Circuit Court to halt construction.

Frankel said that in the Kaloi Gulch case (see above item), he has gotten a stipulation from Haseko attorney Yvonne Izu that construction of drainage improvements would not start until the contested case hearing NHLC had requested is done.

"We threatened to file a restraining order, but she understands it's crazy" to start construction in the middle of a contested case hearing, he said.

The Land Board, however, held a different view. On April 13, it issued Minute Order 17, which would have allowed construction to begin, but would have amended the CDUP to give the DLNR and all parties to the contested case 30 days advance notice of any construction activity. It would also have given the Land Board the power to impose conditions on construction activities. A hearing on the motion was scheduled for April 27.

In its FY 2013 budget request to Congress, the National Science Foundation stated that the project had initially postponed site preparation until the case was resolved.

"Given the recent history of telescope construction on mountains sacred to Native American and Native Hawaiian people, delay in obtaining permission to begin construction was anticipated," it stated.

Because of the delay, the project "will accelerate the expenditure of ARRA [American Reinvestment and Recovery Act] funds, in keeping with Administration policy," the foundation stated. (Congress appropriated $146 million in ARRA funds in FY 2009.)

Waters says the university has waited patiently throughout the contested case hearing process. But "[d]ue to an overly long contested case process (now over one year), the ATST Project is losing ARRA funding for this project at the rate of about $500,000 per month since January 2012 unless we begin work. The project cannot afford to delay any longer to act on the permit we've had since December of 2010," she wrote in an email to *Environment Hawai'i*.

She added, "The mitigation work in this phase is simply to return the area to its prior state (remove Reber Circle, clear material and debris from previously disturbed areas of prior astronomy use, prepare underground utility corridors in adjacent areas for electricity and other uses), not to begin constructing buildings. The CDUP itself requires that work begin prior to December 2012."

"There is no 'stay' or other condition before commencement of work that must be met. It technically could have started in December of 2010; but out of respect for the contested case process, project management waited as long as it could," she said.

Although this appears to be the first time a permittee has decided to start construction in the Conservation District in the midst of a contested case, there are no statutes or rules that prevent it, according to DLNR public information officer Deborah Ward.

Asked whether the department is concerned that other CDUP holders in the same situation might also proceed with their projects, Ward chose not to comment, citing the pending litigation.

On April 13, Rosemary Fazio was appointed as the new hearing officer.

♣♣♣

NOAA Gets NWHI Permit To Cull Pup-Eating Sharks

Once again, to protect endangered Hawaiian monk seal pups, the Land Board has approved a permit to kill rogue Galapagos sharks at French Frigate Shoals in the Northwestern Hawaiian Islands. Under the permit, researchers with the National Oceanic and Atmospheric Administration have until May 31, 2013, to kill up to 18 sharks via hand lines, harpoons, drum line, bottom sets, and netting. Captured sharks will be brought ashore, roped and humanely killed with a bang stick, according to a DLNR report.

In response to concerns raised by native Hawaiians, shark carcasses will be disposed of at multiple deepwater locations, while the skin and jaws will be retained for cultural purposes.

Since 2010, NOAA has removed only two sharks. In addition to remove up to 18 sharks, NOAA hopes to translocate weaned pups to safer islets this year.

Although there was not unanimous agreement, the Monument Management Board supported the permit, according to Bob Nishimoto of the DLNR's Division of Aquatic Resources.

At the Land Board's March 23 meeting, Nishimoto asked that the board declare the permit actions are exempt from review under Hawai'i's environmental law, Chapter 343.

NOAA monk seal expert Charles Littnan said there are anywhere from 600 to a couple of thousand Galapagos sharks around FFS.

"Overall, Galapagos sharks are doing really well across the NWHI," he said.

Littnan noted that juvenile survival has jumped recently.

"The great bottleneck now is the loss of pups due to shark mortality," he said.

— Teresa Dawson

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WHATEVER HAPPENED TO...

The 'Aina Le'a Development

The long-running saga of developers' efforts to follow through on plans for about a thousand acres near the Mauna Lani hotel, on the Big Island, has slowed down in the last year, as several lawsuits wend their way through state and federal courts.

The most recent litigation was filed last last year in the 1st Circuit Court. Goodfellow Bros., Inc., sued the current developer, DW 'Aina Le'a and Hawai'i Escrow and Title (HET), with the contractor alleging it was owed more than $1 million for construction work.

DW 'Aina Le'a had hired GBI in 2009 to build a 400-unit project (with 385 of the units being classed as "affordable") for an estimated cost of $33,108,665. GBI started work in August but stopped before the year was out, claiming DWAL had not made promised payments.

For its part, DW claimed that it found inaccuracies in GBI's invoices, which included overhead fees and legal fees that were not to have been in the billings.

Under pressure by the LUC to complete the units, DWAL's Robert Wessels executed a $5.5 million dollar promissory note on May 4, 2010, in exchange for GBI's promise to complete the project.

Work resumed and over the next several months, DWAL authorized payments to GBI from September 2010 to June 2011 totaling $4,407,984.44. In June, however, Wessels advised HET to stop paying GBI until disputes over amounts due were resolved. GBI, however, demanded that HET disburse the remaining $1,040,000 it believed it was owed and sued them both in November.

Although the lawsuit is still pending, the parties agreed last December to have HET hold $750,000 in escrow while disbursing the rest to DW 'Aina Le'a. HET will hold the $750,000 pending the results of binding arbitration between DW and GBI, which has been scheduled for May 21 through 23.

Early last month, the *Hawai'i Tribune-Herald* published a display ad, inviting contractors to bid on construction of a 25-foot wide private roadway, approximately 4,000 feet in length, for Lulana Gardens, the name that DW 'Aina Le'a has bestowed on its affordable housing project. The project "has an approximate start date of Wednesday, April 25, 2012," the ad stated.

According to DWAL managing partner Steve Dunnington, the roadway was part of the work that Goodfellow was to have done.

As of press time, the contract had not been awarded. On a weekday in mid-April, there was no sign of activity in the development area. The entrance gate was padlocked.

The Federal Case

In federal court, meanwhile, the case that landowner and previous developer Bridge 'Aina Le'a brought against the state Land Use Commission is on hold. On March 30, federal district Judge Susan Oki Mollway issued an order staying the case, pending resolution of an appeal of the state judge's ruling.

The state judge, Elizabeth Strance of the 3rd Circuit Court, issued an oral ruling last December in favor of Bridge 'Aina Le'a and DW 'Aina Le'a Development. She determined that the LUC's revocation of the "Urban" land use classification violated state law as well as Bridge's and DW's right to due process under the U.S. and state constitutions.

A billboard at the entry to the 'Aina Le'a development has promised a stoplight "coming soon" for more than a year.

Mollway noted that the "defendants have informed the court that they intend to appeal Judge Strance's order." Until that appeal runs its course, the federal case is on ice.

"The court stays the present case pending the appeal of Judge Strance's order reversing and vacating the Commission's decision to reclassify the property in issue from urban use to agricultural use," Mollway wrote. "The court administratively closes this case and terminates all pending motions. The case will be reopened upon the parties' submission of written statements either attaching the final appellate decision, or explaining a change in circumstances that warrants the reopening of this case."

William Wynhoff, a deputy attorney general for the state who is litigating this case, told *Environment Hawai'i* that the state has filed a motion asking Strance to alter or amend her ruling. ***— T.D. and P.T.***