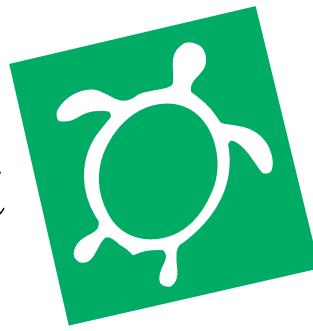


# Environment



# Hawai'i

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## A War on Turtles?

Sea turtles, those gentlest of creatures, seem to have come under attack by myriad forces in the last few months. The National Marine Fisheries Service has proposed new rules for the swordfish fishery in Hawai'i that will allow it to interact with far more endangered loggerhead and leatherback turtles than had been allowed previously.

And the same agency has looked with favor on a proposal, initiated by the Western Pacific Fishery Management Council disguised as a Hawaiian Civic Club, to remove the green sea turtle in Hawai'i from all protections it has enjoyed under the federal Endangered Species Act.

Public outrage to both has been significant, with tens of thousands more people taking the trouble to oppose the changes than those who support them.

And, on the subject of outrages: don't overlook our articles on the Public Land Development Corporation and Wespac's new book.

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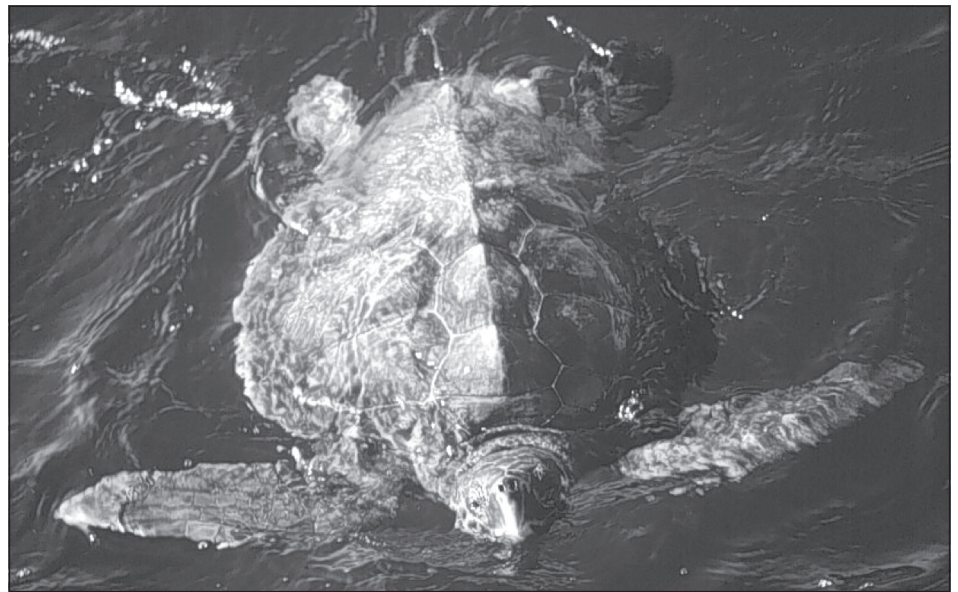
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Loggerhead sea turtle

PHOTO: NMFS/FWS

## New NMFS Rule Allows Increased Injury To Turtles By Hawai'i Swordfish Fleet

The National Marine Fisheries Service has approved a new rule that significantly increases the potential number of loggerhead and leatherback sea turtles that can be harmed by the Hawai'i swordfish fleet in a given year.

On October 4, the *Federal Register* published notice of NMFS' approval of the rule. When it takes effect on November 5 – absent a court-ordered stay – the swordfish fishery will be able to interact with, or “take,” up to 26 leatherbacks and 34 loggerheads a year before it is shut down. The new numbers represent an increase of 62 and 100 percent, respectively, over the previous incidental take limits of 16 leatherbacks and 17 loggerheads.

As the non-profit group Oceana noted in a press release following the *Federal Register* notice, “The timing for this approval is particularly paradoxical, as NMFS upgraded the status of the Pacific loggerhead sea turtle from ‘threatened’ to ‘endangered’ little more than a

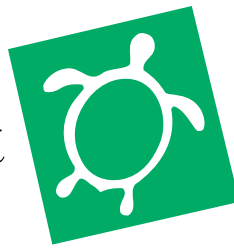
year ago, and designated almost 42,000 square miles of ocean waters off the coasts of California, Oregon, and Washington as critical habitat for leatherback sea turtles earlier this year.”

Catherine Kilduff of the Center for Biological Diversity, a group that had previously sued to protect the turtles from harm inflicted by longline interactions, made a similar point. The new rule, she told *Environment Hawai'i*, is “definitely dismaying, because since our prior court challenge, the loggerhead in the North Pacific has been upgraded” to endangered from threatened under the Endangered Species Act.

As of press time, no one with any of the groups that expressed opposition to the rules would say whether they would be suing NMFS to block implementation of the new rule. However, the Hawai'i Longline Association, which has been a strong supporter of lifting

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# Environment Hawai'i



Volume 23, No. 5

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## NEW AND NOTEWORTHY

**False Killer Whales Protected:** The lawsuit brought last June against the National Marine Fisheries Service over failure to protect false killer whales from injury inflicted by Hawai'i longline fishing vessels has been settled. Under an agreement announced last month, the service will implement protections for the animals – which are actually large dolphins – by the end of the month.

The service had developed a plan to protect the animals more than two years ago. At that time, and again in response to litigation, it convened a take reduction team. Within six months, the team had come up with a plan to significantly reduce, if not altogether eliminate, the interactions between the longliners and the



PHOTO: ROBIN BAIRD

False killer whales in waters off Kaua'i.

false killer whales. However, until now, NMFS had not taken steps to implement the measures called for.

Last June, six months after the legal deadline for NMFS to act had passed, Earthjustice sued the service, on behalf of the Center for Biological Diversity and Turtle Island Restoration Network.

In announcing the settlement, Earthjustice noted that NMFS' "own data have shown for over a decade that Hawai'i-based longline fishing kills false killer whales in Hawaiian waters at unsustainable rates. The latest data, which the agency released in August 2012, reveal that, each year, longline fishing kills an average of more than 13 false killer whales from the Hawai'i Pelagic Stock (animals found more than 22 nautical miles from the main Hawaiian is-

lands), nearly 50 percent more than what the agency has said that population can sustain."

Also, "False killer whales in the Hawai'i Insular Stock (animals found within 76 nautical miles of the main Hawaiian Islands) are being killed ... at nearly twice the sustainable rate... Only about 150 of these animals remain, and the Fisheries Service has proposed to list them as 'endangered' under the Endangered Species Act."

According to Earthjustice attorney David Henkin, "It has taken three lawsuits over nearly a decade to compel the Fisheries Service finally to protect Hawai'i's false killer whales. Without citizen suits, the agency may well have dragged its feet until it was too late to save these unique marine mammals."

**A Cancelled Meeting:** Last month, staff with the Department of Land and Natural Resources' Division of Forestry and Wildlife were forced to reschedule a meeting of the Forest Stewardship Advisory Committee. The reason?

Failure to comply with the Sunshine Law.

The meeting had been scheduled for October 11. However, contrary to Sunshine Law requirements, no notice of the meeting was sent to those individuals (including *Environment Hawai'i*) who had requested to be notified of the committee's meetings. The notice posted at the Lieutenant Governor's office included no start time for the meeting.

When *Environment Hawai'i* was informed of the meeting, just two days before it was scheduled to be held, we asked that it be cancelled. After consulting with the attorney general's office and the Office of Information Practices, DLNR staff made the decision to cancel. The meeting was later rescheduled to October 29.

*Environment Hawai'i* first requested to be notified of FSAC meetings in 2007. At that time, we were informed that the committee was not subject to the Sunshine Law. We appealed to the OIP, which, in July 2011, issued a memorandum opinion that found the committee did, indeed, have to give notice of its meetings to anyone who requested.

### Environment Hawai'i

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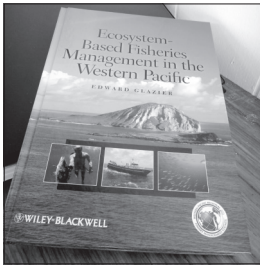
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### Quote of the Month

*"[I]t appears NMFS is taking the position that the North Pacific loggerhead population is declining towards extinction anyways, so why not just let U.S. fishermen kill a few more."*

— Ben Enticknap, *Oceana*

## Book Price: \$210. Taxpayers' Cost: \$540.



In the spring of 2011, Wiley-Blackwell, the well regarded publisher of scientific texts, came out with new title: *Ecosystem-Based Fisheries Management in the Western Pacific*. A blurb on the book's back cover states that it "documents a three-part series of workshops convened by the Western Pacific Regional Fishery Management Council to facilitate understanding of this promising new approach" to managing fisheries.

And although the book was published by Wiley-Blackwell, the council's logo appears

prominently on its front and back covers – a tip-off that the book did not go through the usual rigorous process of peer-review to which scientific texts are customarily submitted. Instead, according to information provided to *Environment Hawai'i* through a Freedom-of-Information Act request, council Executive Director Kitty Simonds contracted with the company to print the book for \$12,000, in return for which the council would receive 200 copies.

The contract makes it clear that absent the payment, Wiley-Blackwell would not publish the volume. In a paragraph titled "Special Provisions," the contract states: "Publication of this work is dependent on receipt of a purchase order from [the council] for 200 copies at the price of \$60 per copy prior to

manuscript delivery."

The council also paid the book's editor, Edward Glazier, for his services. Glazier, a frequent contractor to the council and a principal of Impact Assessment, Inc., the company whose name appears on the invoices, was paid at least \$95,500 for his services, which included helping to organize the workshops, preparing the report of the proceedings, and finding a publisher for it.

All totaled, the book cost the taxpayer-financed council a minimum \$107,500, or \$540 per copy. That doesn't include the substantial costs associated with holding the workshops, which were attended by invited guests from throughout the Pacific, the continental United States, and from as far away as England. Or, to quote the book, the workshops involved "local, regional, national, and international experts representing a variety of relevant disciplines."

— Patricia Tummons

### BOOK REVIEW

## Wespac's Book Is a Costly Effort To Justify 'Aha Kiole, 'Aha Moku Push

Edward Glazier, editor. *Ecosystem-Based Fisheries Management in the Western Pacific*. Published by Wiley-Blackwell and the Western Pacific Fisheries Management Council, 2011. 280 pages plus 24 pages of color plates. \$209.95 hard cover.

In the category of expensive books that few will ever read, this recent publication of the Western Pacific Fisheries Management Council ranks high. With a list price of \$209.95 – a few dollars less, if you order through Amazon – and a table of contents that is Sominex on a page, *Ecosystem-Based Fisheries Management in the Western Pacific* is never going to make the best-seller list.

Of course, given that it is a volume entirely conceived, written, printed, and distributed with one sole purpose – to justify the council's push to manage near-shore and on-shore resources – the idea that the book would be a commercial success probably never entered into the picture.

Probably few people outside the council's immediate circle have heard of or seen the book. It came to my attention only by chance: At this spring's meeting of the Council Coordination Committee, hosted by Wespac, copies of the volume were stacked next to the table where I was asked to register. When I inquired about the book – "Are these for

sale?" I asked – I was told to just take one.

That the book has received little – make that virtually no – attention in scientific publications is hardly surprising. Although a number of respected experts participated in the three council-sponsored workshops that are reported in this volume, the work they presented broke no new ground and consisted largely of summaries of work they had published (or were to publish) elsewhere.

Beyond recapping the experts' presentations, the book reports on the discussions between the experts in western science and the people in attendance who advocated resource management based on traditional practices. In the end, there seems to have been no meeting of the minds on this score. For example, at the conclusion of the first workshop (on ecosystem science and management), participants came up with recommendations on how to begin to develop ecosystem management plans (as opposed to single-species or suite-of-species plans), all of which were unexceptional. But then Glazier adds a cautionary note that walks back some of them. Among other things, he says, fishery managers should "apply the precautionary principle as a default, but gauge the potential human impacts of doing so."

What's more, the reporting verges on fiction – a point Glazier seems to acknowledge. "The summaries [of discussions] are consis-

tently presented in a third-person narrative form so as to minimize use of quotations and redundant shifting between person and tense," he writes. "Interpretive-artistic license was taken in certain cases with the intent of clarifying points being made by the presenters."

### *A New Foundation*

In hindsight, the purpose of the workshops, and this volume that commits the proceedings to history, has become clear. Council executive director Kitty Simonds began referring to them early on in her push to get local groups of Hawaiians to assert a role in the state's management of near-shore fisheries. The first of several *puwalu* convened in August 2006, just a few months after the second of the three workshops on ecosystem management. The Wespac-sponsored *puwalu* led eventually to the establishment of 'Aha Kiole councils across the state and ultimately to their being enshrined in state law this year as the 'Aha Moku advisory committee within the Department of Land and Natural Resources. (For further background on the 'Aha Kiole councils, the *puwalu*, and Wespac's role in them, see the many articles that *Environment Hawai'i* has published on this subject.)

In this light, the book gains significance, since it bolsters arguments made by Simonds and others for a greater role for native peoples in managing resources. In fact, in the write-up of the last of the three workshops, on ecosystem policy, Glazier notes that the council has already moved in this direction. At this workshop, he writes, "Council staff members related that the Western Pacific Council had collectively arrived at a vision for the future of

## PLDC Adopts a Strategic Plan, Amends Rules for Public Hearings

If public testimony is any indication, the Public Land Development Corporation has swayed none of its major critics by adopting a strategic plan. And recent amendments to the agency's proposed administrative rules have also quelled no concerns.

Those who already support the agency — the General Contractors Association, renewable energy developers, and their consultants — testified in favor of the PLDC board's adoption of the plan, its associated flow chart, and the proposed rule amendments at the PLDC's meeting on October 11.

The critics, while expressing their appreciation for the PLDC's effort to address community concerns, only stepped up their criticism.

Their main beef with the strategic plan: Its components aren't reflected in the statute establishing the PLDC or in the agency's proposed administrative rules. Therefore, the plan has no legal significance.

"The failure to incorporate the strategic plan into your rules renders the strategic plan an empty gesture," wrote Native Hawaiian Legal Corporation attorney David Kimo Frankel in testimony to the PLDC.

As for the proposed rule amendments, Frankel and others pushed the PLDC to include provisions of some of the environmental regulations the agency is now exempt from. It was a recommendation they had raised during public hearings on the first draft of administrative rules, to no avail.

"[The Office of Hawaiian Affairs] and others submitted a lot of the same language to you before you went to public hearings the first time. You would have saved a lot of heartburn. If they're not incorporated a second time, you will have a lot of heartache," Frankel warned.

the ecosystem approach and that objectives had been developed to satisfy that vision. Those relate primarily to the process for deepening relationships with island communities over the course of time, and to immediate and practical plans for initiating that process. Efforts were currently being undertaken to successfully initiate the [Regional Ecosystem Advisory Committees], which were intended to improve the Council's understanding of the biophysical and human dimensions of the region's marine ecosystems and thereby introduce a more effective and

### Public Fears

For months, the staff and creators of the PLDC (including the governor's office) have been trying to extinguish the public's fears about an agency that can allow developers of public lands to bypass most of the state's regulations that protect environmental and cultural resources — regulations that, according to Frankel, have protected O'ahu's Ka Iwi shoreline and 'Ewa beach, Moloka'i's La'au Point, Hanalei on Kaua'i, Honoli'i on the Big Island, and many other places, from inappropriate development.

Under Act 55, which established the PLDC in 2011, developers working with the PLDC would, indeed, appear to be exempt from all state and county land use laws, so long as the PLDC had "coordinated with" county planning departments and county land use plans, policies, and ordinances.

Such language has appeared neither the public nor the counties. The Kaua'i and Hawai'i county councils have recently adopted resolutions calling for the repeal of Act 55, something that state House Representative Cynthia Thielen has promised to try to do next legislative session.

Frankel told the PLDC board that the public distrust stems from a lack of candor. To date, the PLDC has not said whether it will comply with statutes regarding the Conservation District, the state Land Use Commission, and coastal zone management.

"Will PLDC comply with Chapter 183, 205, 205A? Why don't you tell the public?" he asked.

"It's not absurd for the public to have fear" about inappropriate development, Frankel added, since, even without PLDC involvement, the City and County of Honolulu is entertaining a proposal by developer Andy

empowering management regime."

And what of the council's jurisdictional limits? By federal law, it has no say-so in management of waters from shore to three miles out.

Never mind that, Glazier suggests. "It was agreed [at the workshop] that the REAC process could and would allow the Council to consider and address issues extending beyond those it had traditionally considered, such as terrestrially generated pollution and other factors affecting comprehensively envisioned marine ecosystems." — *Patricia Tummons*

Anderson to build a hotel on city-owned park land in Hale'iwa, on O'ahu's North Shore.

"There's litigation over it," Frankel said.

### Just a Conduit

To clarify what the PLDC will do and how it will operate, state Senators Malama Solomon and Donovan Dela Cruz helped PLDC staff develop a strategic plan.

Under the plan, the PLDC now has guiding values, such as "be fair," "support and aid," and "facilitate and connect."

The plan lists nine guidelines, some of which simply restate laws that the PLDC is required to follow. Under other guidelines, the PLDC promises not to sell land or develop lands eligible for designation as important agricultural lands (IAL). It will also heed conditions imposed on projects by the state or county agency holding title and county conditions on infrastructure connection.

One guideline seems to go beyond what Act 55 allows. It promises to give 85 percent of the state's share of project revenues to any agency that has title to or management over the underlying state or county lands. The act, however, states that 85 percent of the state's revenue must go to either the Department of Land and Natural Resources' special land and development fund or its boating special fund.

The plan lists key components of PLDC projects:

- Achieve department and agency goals.
- Have value and significance to the community.
- Help preserve culture, agriculture, conservation and preservation.
- Be self-sustaining.
- Have a positive economic impact.
- Have long-term value.

At the PLDC's October meeting, executive director Lloyd Haraguchi stressed that the PLDC's work will be achieved through partnerships with state and county agencies and non-profits "to create jobs for the public benefit."

In all cases, he said, the title agency leasing land or transferring management to the PLDC will take the lead.

"They're driving the bus, we're the conduit," he said. "The county has control over water, sewer. Without cooperation by the county ... the project stops. This is an effort where the people driving the bus will be the title agency and the county."

The plan's flow chart first outlines how project applications will lead to leases or memorandums of understanding between a title agency (i.e., the DLNR) and the PLDC. Once the PLDC gains control over the land, projects can follow one of three tracks — depending on what kind of development/

management partner, if any, is involved — eventually resulting in a lease and/or partnership agreement between an applicant and the PLDC.

Under the scenarios set forth in the flow chart, the public will have four to seven opportunities to comment at a public meeting, depending on which track an application takes. (The flow chart misidentifies these as public hearings.) Instances where outside agencies are proposing projects would require seven public meetings, while those where the PLDC is simply taking over management would require four.

“This [addresses] one of the major concerns, that we were providing maybe just one opportunity for public input,” Haraguchi said.

The county and title agency would set project conditions based on an initial project proposal, and compliance with state historic preservation and environmental review laws could occur after the title agency transfers management or issues a lease to the PLDC, according to the flow chart.

### ***‘Not Legally Binding’***

Frankel, and representatives of the Hawai'i chapter of the Sierra Club, the Office of Hawaiian Affairs, and Life of the Land asked the PLDC not to adopt the strategic plan until or unless its terms are incorporated into the proposed administrative rules.

Former state deputy attorney general Patricia Talbert (now with Innovations Development Group), however, said she wasn't sure the plan was meant to be legally binding.

“These things speak to how a board is going to function. Statutes and rules don't tell you how you're going to open the doors each day,” she said.

In any case, the strategic plan's terms don't quite match up with the proposed administrative rules, OHA senior policy analyst Jocelyn Doane told the board.

For example, the plan suggests that the title agency and counties will recommend project conditions based on an initial project proposal. Under the proposed administrative rules, however, such a proposal will only be done if the PLDC's executive director thinks it's required.

In written testimony, OHA noted that the administrative rules were unclear how the county would provide comments on infrastructure requirements if the executive director doesn't require an initial project proposal.

Another inconsistency between the plan and the rules involved the six key components of a PLDC project. The plan simply lists the components without indicating whether a project needs to meet them all or just one. The proposed rules require projects to be either self-sustaining or generate revenue. As for the rest

of the key components, a project would need to meet only one of them, under the rules.

Rep. Thielen noted that the proposed rules originally required a project to meet all of the components.

“[T]he word ‘and’ has been replaced with the disjunctive word ‘or.’ This means that in reality, only ONE of these five elements - for example ‘positive economic impact’ — will be required. ... EVERY proposed project can be said to have some kind of positive economic impact, even if it ultimately fails on the other five elements,” she wrote.

That the flow chart appeared to allow a title agency to approve projects well before they complete the environmental review process worried Frankel.

“The title agency shouldn't approve a project unless Chapter 343 is done. They will be making a decision without the information it needs. And they will be sued and we will win,” he said.

(According to deputy attorney general Linda Chow, although the flow chart indicates Chapter 343 environmental review will accompany a final project proposal submitted after PLDC has control of the land, the review could be done any time before then. The proposed administrative rules would require that a finding of no significant impact accompany initial project proposals “if applicable to the project at this stage.”)

The strategic plan's commitment not to develop eligible IAL lands is not mentioned in the rules at all, Doane and others noted.

“Members of the public understand that the strategic plan is not legally binding. If you mean it, put [its provisions] in the rules,” Frankel said. “You say you're not going to develop important agricultural lands. You don't say it in the rules. Say it!”

The Sierra Club and OHA argued that the PLDC's strategic plan and rules should also commit to leaving lands in the county special management area and state Conservation District alone.

“These lands often contain Hawai'i's most fragile natural and cultural resources, including those that are critical not only to Native Hawaiians' immediate well being, but to the very survival of our culture and way of life,” wrote OHA CEO Kamana'opono Crabbe in testimony to the PLDC.

“There are certain projects I think we can agree should be off the table. We should agree to that,” added Sierra Club, Hawai'i Chapter, executive director Robert Harris.

With regard to Haraguchi's earlier comment on the need for the county's cooperation on water and sewer connections, Frankel argued that Haraguchi had a fundamental misunderstanding of the county's role in

controlling development.

The county's concern about a particular project may not be with wastewater, but with the traffic it may generate, he said. By limiting the county's input to certain infrastructure requirements, “it's deceptive to say the county has this large role,” Frankel said.

### ***Administrative Rules***

Rep. Thielen's comments on the proposed administrative rules also touched on the PLDC's apparent lack of commitment to follow county plans. She notes in her written testimony that the proposed rules only require that projects be “consistent with county community or development plan for the area, as closely as is practical.”

“[T]he phrase ‘as closely as is practical’ renders this ‘requirement’ purely aspirational,” she wrote.

After the first round of public hearings, the PLDC made several amendments, including expanding the definition of culturally sensitive, requiring an initial project proposal, and deleting sections on financing, among other things.

To Doane, more changes were needed before the board approved a second round of public hearings.

“You'd need to go back again if substantial changes are made again. We are concerned about the lack of provisions to ensure transparency, accountability, and due diligence, and the lack of provisions to ensure the PLDC is able to fulfill obligations regarding cultural sensitivity,” she said.

Frankel asked the board not to assume that the title agency will review PLDC projects “according to the standards it currently operates under when deciding whether to approve a project.”

He argued that the title agency may know nothing about the nature of a proposed project before land is transferred.

“Second, and much more importantly, there are no standards that govern the agency's decision to transfer development rights to the PLDC,” Frankel wrote in testimony.

Doane, Harris, and Frankel also again tried to get the PLDC to forfeit some of the exemptions granted by Act 55 by incorporating some of the protective language contained in statutes regarding coastal zone management and the Conservation District, among other things. They also tried to get the board to include provisions in the rules to prevent developers with a history of violations from applying for projects.

The board ignored all of their recommendations and approved the amendments to the administrative rules as submitted by Haraguchi. — *Teresa Dawson*

### *Swordfish from page 1*

the turtle limits, indicated in its comments that a court challenge is practically a foregone conclusion. Jeffrey W. Leppo, an attorney representing the HLA, concluded his comment letter with the statement, “we hope and anticipate that NMFS will fully defend its final decision on the merits in the inevitable legal challenge that will be pursued by environmental advocacy groups.”

### *A Recycled Rule*

Back in 2009, NMFS proposed raising the allowable take of loggerheads and leatherbacks in a nearly identical way, lifting the limit on loggerheads from 17 to 46 and on leatherbacks from 16 to 17. The Center for Biological Diversity, Turtle Island Restoration Network, and KAHEA: The Hawai'i-Environmental Alliance jointly sued the agency. In a settlement approved by Honolulu federal Judge David Ezra, NMFS set aside the proposed rule as it applied to the turtle limits (other aspects of the rule, including a lifting of curbs on the number of swordfish sets that could be made in a given year, were adopted). NMFS also agreed to prepare a new biological opinion within 135 days of its having made a final determination on the proposed uplisting of nine distinct population segments of loggerheads, from threatened to endangered.

The HLA challenged the settlement in the 9<sup>th</sup> U.S. Circuit Court of Appeals. In a decision published just last March, the appellate court rejected HLA's arguments. By then, however, NMFS had issued a new biological opinion (BiOp), which had been blessed by the HLA even prior to its public release in late January. On June 11, NMFS opened a one-month period of public comment on the proposed rule based on the new BiOp. The final rule—unchanged in any meaningful way from the draft one—was published on October 4.

### *'Fatally Flawed' BiOp*

Many of the comments harshly critical of the proposed rule focused on the supporting biological opinion. David Henkin, an attorney with Earthjustice (which represented the plaintiffs in the 2009 court challenge), described the opinion as “fatally flawed.”

For one thing, Henkin argues, the population models for leatherbacks and loggerheads used by NMFS produce “an overly optimistic view of the status of these species and the effects of NMFS' proposed action.”

The climate-based population model NMFS relies upon minimizes the effect of human-caused mortality, he goes on to say.

“By comparing the effects of only one fishery to a measure of large-scale environmental variability, NMFS has essentially guaranteed a no-jeopardy determination,” he writes. “As NMFS admits, [f]urther research is needed on how climatic and anthropogenic forces together impact the trends of turtle populations,” he continues. “Therefore, it is too early to allow climate models to overshadow effects from fishing mortality, especially in the context of an [Endangered Species Act] jeopardy analysis.”

Oceana also had harsh words for the climate-based population model. “The model does not include other anthropogenic mortalities (e.g., bycatch in other fisheries), but rather just the direct effects of the proposed action,” writes Ben Enticknap, Pacific project manager for the organization. “Even so,” he continues, “with this model NMFS finds that [the] North Pacific loggerhead sea turtle population is at ‘a heightened risk of extinction’ and the population will decrease significantly over the next 25 years.” More than 99 percent of the scenarios in this population model show the population declining over the next generation, he notes, even without the increased incidental take of loggerheads by the swordfish fishery. The increased take, he observes, “inflicts an additional loss of four to eleven percent.”

“The proposed action to allow 34 loggerhead sea turtle takes, making up seven mortalities a year, would be an increase in the government-authorized killing of what is now an endangered distinct population,” Enticknap writes.

But even the agency's estimate of seven mortalities a year is flawed, he goes on to argue: “NMFS is being overly risky in assuming that 34 takes equals only seven mortalities and only one adult female. This then increases the risk that the [population models] are underestimating the true impact of the proposed action.”

“Ultimately, ... it appears NMFS is taking the position that the North Pacific loggerhead population is declining towards extinction anyways, so why not just let U.S. fishermen kill a few more.... This is not only unlawful, it is reckless and irresponsible [and] ... in contravention to NMFS' affirmative duty to recover the species.”

NMFS' population models for the leatherback are similarly problematic, Enticknap writes, with the agency discounting “the empirical data showing a population decline and the many other factors affecting the population that were not addressed by the climate-based” model.

“The loss of even a few individual loggerheads and leatherbacks is all the more signifi-

cant in light of the species' poor baseline condition,” writes Henkin of Earthjustice. As the BiOp itself acknowledges, he continues, “Climate-change impacts are expected to result in the inundation of nesting beaches and possibly skewed sex ratios as temperatures at nesting beaches continue to rise.”

Telegraphing possible legal objections to the increased incidental take limits, Henkin notes that the 9<sup>th</sup> Circuit has already made clear, in a 2008 case, that “where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.”

### *A 'Beneficial' Fishery*

Not surprisingly, Leppo, the attorney representing HLA, has a view of the regulations diametrically opposed to those of Earthjustice, Oceana, and the more than 2,000 individuals who signed petitions or weighed in with their own critical remarks during the public comment period last summer.

According to Leppo, “the regulatory record establishes that, taken as a whole, the effects of the shallow-set fishery are *beneficial* to both leatherback and North Pacific loggerhead sea turtles” (emphasis in original). The chief argument he is able to muster to support this point of view is that there is a market displacement effect, or “spillover effect” that occurs when the regulated boats capture fish that otherwise, the argument goes, would be caught by less regulated, less turtle-friendly fleets.

The “scientific community (including NMFS) has demonstrated that as the shallow-set fishery increases its effort, it displaces the effort of high-impact foreign swordfish fisheries,” Leppo writes.

Earlier this year, the 9<sup>th</sup> Circuit panel hearing the HLA's appeal roundly rejected this argument, noting that the 2008 BiOp “found the market transfer effects argument ‘too speculative to be persuasive.’” In that BiOp, the study that supported the spillover-effect argument had been bought and paid for by the HLA.

The 2012 BiOp, prepared after the appeals court heard arguments, relied on a new study of market transfer effects conducted by Hing Ling Chan (with the University of Hawai'i's Joint Institute for Marine and Atmospheric Research) and Minling Pan (with NMFS' Pacific Islands Fisheries Science Center). That study, which was released by NMFS the same month as the BiOp, found that “higher Hawai'i swordfish production results in lower demand for imported swordfish, which in turn reduces sea turtle bycatch worldwide because the sea turtle bycatch rates in the exporting countries' fleets are higher than

that in the Hawai'i shallow-set longline swordfish fishery." Also, they write, their study "implies that reducing Hawai'i shallow-set longline swordfish production through regulatory changes ... did not cause an overall lower level of sea turtle bycatch in the North and central Pacific... because the Hawai'i ... swordfish fishery has one of the lowest sea turtle bycatch rates among the fleets fishing" in the area. In other words, despite the imposition of regulations on the U.S. fleet intended to protect turtles, the turtles did not benefit, since the swordfish were pursued by vessels from countries unconstrained by such regulation.

The Pan and Chan study was harshly criticized by Jason Scorse, professor of international environmental policy at the Monterey Institute and also the director of its Center for the Blue Economy. The study is flawed because the authors did not show that any increase in foreign production of swordfish occurred directly as a result of the Hawaiian restrictions and would not have occurred otherwise, he argues. Or, as he writes, "the only robust way to show that the restrictions on Hawaiian swordfish production lead to increases in global turtle mortality would be to show that the actual swordfish not caught [by the Hawai'i fleet] are caught by non-U.S. producers with higher turtle bycatch rates AND that these represent additional catch for these non-U.S. producers. ... Unless it can be shown that the swordfish not caught by Hawaiian swordfish producers are caught by others, leaving total global production unchanged, then the case for increased turtle bycatch simply does not exist."

### **Restrict Imports?**

Oceana's Enticknap also disputes the central thesis of Pan and Chan, which is a cornerstone of the BiOp's finding that turtle takes can be increased without putting their populations in jeopardy of extinction. Enticknap cites many of the same reasons set forth by Scorse, but goes on to note that NMFS can take action to minimize the turtle bycatch of the less regulated nations through restrictions of imports.

The Secretary of Commerce, he writes, "is required to make a determination that the government of a harvesting nation has 'provided documentary evidence of the adoption of a regulatory program governing the conservation of the protected living marine resource that is comparable to that of the United States ... and which, in the case of pelagic longline fishing, includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs.' This has not occurred."

Henkin of Earthjustice makes the same point: "if NMFS is serious about reducing U.S. swordfish imports and the bycatch associated with them, the agency has legal tools available to address the issue directly, rather than relying on an unproven 'spillover effect.'" The Center for Biological Diversity and Turtle Island Restoration Network "petitioned NMFS to ban swordfish from several dozen nations" under the provision cited above, Henkin notes. "NMFS has yet to take any decisive action on the petition. Given that NMFS has not used the legal tools that not only authorize, but *require* it to address foreign bycatch of sea turtles and other marine wildlife through direct means, its purported interest in spillover effects rings hollow. All in all, NMFS's attempts to use theoretical market-based effects to justify allowing the Hawai'i fishery to kill more turtles is both irrational and unlawful."

### **Fewer Observers?**

Although the new rule is silent on the subject of observers, several of the commenters remark that the Biological Opinion does not require continuation of the policy of having 100 percent observer coverage for the swordfish fleet.

In setting the conditions that NMFS must follow in permitting the swordfish vessels to operate, the BiOp states only that NMFS "shall maintain observer coverage at rates that have been determined to be statistically reliable for estimating protected species interaction rates onboard Hawai'i-based shallow-set longline vessels."

As Henkin notes, "One of the keys to reducing bycatch ... has been the requirement of 100 percent observer coverage and the implementation of 'hard caps' that require the fishery to close as soon as the incidental take limit for loggerheads or leatherbacks has been reached."

Eliminating this requirement will "undermine the effectiveness of the 'hard caps' on take," he writes. "Without 100 percent observer coverage, NMFS must gather and analyze raw data from a subset of vessels, and come up with an estimate of take for the fishery as a whole. This can involve a significant lag time between when the takes occur and when NMFS analyzes the data and determines that the fishery has met or exceeded its incidental take limit. Moreover, there is a great deal of uncertainty involved in estimating actual take based on less than 100 percent observer coverage. The combination of that uncertainty and reduced reporting by vessels without observers could easily translate into a significant increase in take that would not be immediately detected by NMFS."

NMFS states in response to the comment that the new rule "does not change the 100 percent observer coverage for the fishery." Mike Tosatto, administrator for NMFS' Pacific Islands Regional Office, was asked whether the agency was committed to retaining this level. He did not respond by press time.

### **Advance Approval**

In the past, the longline industry and Wespac have bitterly complained that NMFS did not allow them to review biological opinions in advance of their publication. In 2002, HLA won a federal court ruling that determined, under the Endangered Species Act, the organization could be considered an applicant and, as such, have the right to review a BiOp in its draft form.

And it did so in this case. According to the BiOp, "On October 28, 2011, and November 21, 2011, conference calls were conducted between NMFS PRD [Protected Resources Division], SFD [Sustainable Fisheries Division], and the applicant, the Hawai'i Longline Association (HLA) in order to provide an update on where NMFS PRD was in the process.... On January 2, 2012, the draft biological opinion was provided to the Applicant, HLA, for the proposed action. A conference call was conducted with HLA on January 6, 2012. Comments were received from HLA on January 17, 2012."

The HLA's comments on the draft rule mention these letters in a footnote and state that "they are incorporated by reference." (*Environment Hawai'i* asked NMFS for copies of those letters but had not received them by press time.)

In his comments on the draft rule, Leppo praises the achievements of the shallow-set fishery, stating that since tight regulations were imposed on it in 2004, "loggerhead and leatherback bycatch [has been reduced] by 97 percent and 83 percent, respectively, from prior levels." He also claims that the fishery has "initiated and continues to support successful sea turtle nesting beach conservation in a direct effort to offset the already negligible adverse impacts of the shallow-set fishery and to promote the recovery of Pacific loggerheads and leatherbacks."

In filings with the Internal Revenue Service, the HLA, which is a 501(c)(6) organization (one advancing the interests of businesses), the HLA reports it had \$594,455 in income for 2010, with expenditures of \$772,404. Of that, \$580,620 was used to help "formulate fishery regulations and establish sea turtle conservation measures." And of that amount, \$524,982 was paid to Stoel Rives, Leppo's law firm. In 2009, HLA spent

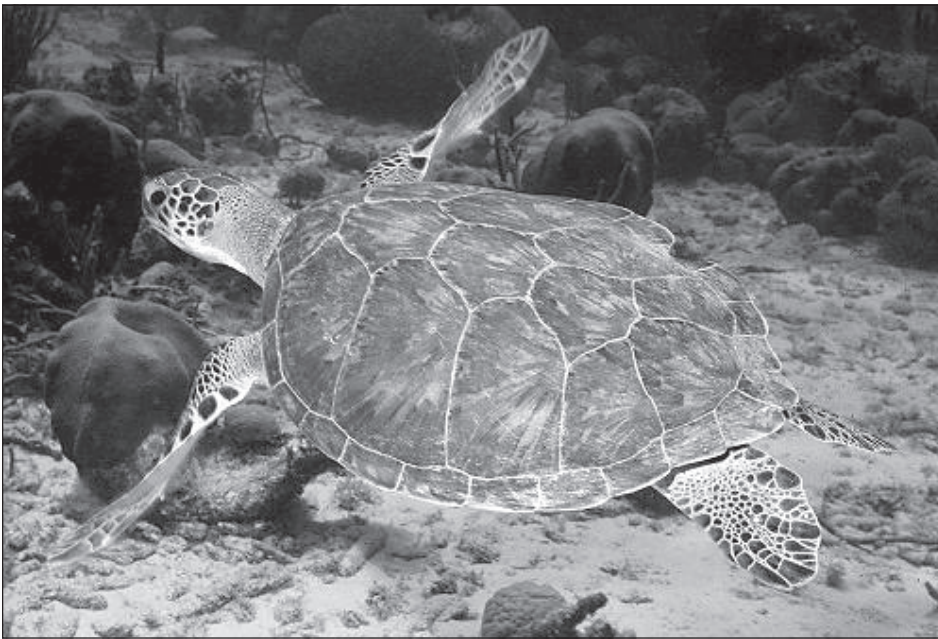


PHOTO: ANDY BRUCKNER, NOAA

Green sea turtle.

## Proposed Delisting of Green Sea Turtle Sees Thousands Rally to Honu's Support

The popular verdict on a proposal to remove Endangered Species Act protections for the Hawai'i population of the green sea turtle is in: by a staggering margin, opponents of the proposal outnumber those who favor it.

Of course, the National Marine Fisheries Service, whose proposed delisting of the turtle prompted the outpouring of support, is not supposed to be guided by public opinion. Rather, the determination it makes is to be based on the best science available. Still, the support for the Hawaiian green turtle, or honu, as it is called in Hawaiian, has been impressive: As of October 1, when the public comment period closed, more than 100,000 people had signed petitions, submitted letters, or otherwise expressed their opposition to the delisting.

The proposal to delist was submitted earlier this year to NMFS by the Association of Hawaiian Civic Clubs. Comments favoring the proposal came from the Western Pacific

Fishery Management Council (Wespac) and a handful of individuals, including some who sit on Wespac advisory panels or who otherwise interact frequently with the council. None of the comments came from anyone writing on behalf of, or identifying himself or herself as a member of, any Hawaiian Civic Club. Nor did the Association itself submit comments.

Most of those commenting, whether for or against, simply expressed personal views. But several environmental groups, whose combined membership reaches into the hundreds of thousands, weighed in with extensive scientific and legal arguments against the finding.

The Wespac comment letter, signed by council executive director Kitty Simonds, points out that NMFS' recovery plan for Pacific populations of the turtle "includes eight recovery criteria, all of which must be met to be considered for delisting." Simonds then goes on to argue that those criteria should not apply to the honu, since the delisting criteria "were not created specific to the Hawaiian population, but instead were created for all green turtles inhabiting U.S. Pacific waters."

The turtle's protection under the Endangered Species Act (ESA) "not only prohibited traditional, cultural, and subsistence use of honu, but also deprived local communities of the ability to take care of the resource upon which they depended," Simonds argues.

\$404,986 for the same purpose, according to its IRS filing, with \$374,086 of that going to Stoel Rives.

In an email, *Environment Hawai'i* asked Leppo to identify those "successful sea turtle nesting beach conservation" measures mentioned in the comment letter, but no response was received by press time.

— *Patricia Tummons*

### Red List Status

As far as scientific arguments are concerned, Wespac's comments rely almost exclusively on the "Red List Assessment" of the Hawai'i green sea turtle published earlier this year by the International Union for the Conservation of Nature. In a review of the turtle's status in Hawai'i, the IUCN determined that it had recovered sufficiently to merit "least concern" status.

That finding was challenged, however, in the extensively footnoted, 41-page comments submitted jointly by representatives of the Center for Biological Diversity, Turtle Island Restoration Network, the Humane Society of the United States, and Earthjustice. "IUCN's positive review of Hawai'i's green sea turtle has several significant flaws," their letter states. "Its conclusions cannot be readily accepted as true if this population is stripped of protections offered by the federal ESA and other protections that may be removed as a consequence."

First, they note, removing protections "would reel back many of the important measures that have prevented anthropogenic harm to the sea turtles and their habitat."

Second, "the IUCN classifications consider different criteria than are used to determine threatened and endangered status under the ESA." While advocates for delisting claim that the turtle's population now stands at some 83 percent of what it was before exploitation, they write, "under the ESA, a 17 percent overall decline of the species with ongoing threats would warrant continued protection."

Third, "the threats from climate change, including sea level rise, ocean warming, and ocean acidification, were underestimated by the IUCN status review." (The IUCN assessment dismisses the potential impacts of sea-level rise with the statement that, while "increases in sea-surface temperature and intensity and number of severe storms are potential climate change-induced threats facing sea turtles... , there is evidence of long-term accretion of islands, so that this effect may be somewhat mitigated." It also notes, however, that with warming temperatures, more males may hatch, "leading to a proportional increase in male production.")

### Ongoing Threats

The Conservation Council for Hawai'i addressed many of the same points. In a 13-page comment, heavy with citations to law, legal precedent, and scientific literature, the group points out that in considering whether to delist a given species, NMFS must consider five criteria for listing set forth in the ESA. If any one of those five criteria persists, a species



may not be delisted, CCH notes. Those factors involve: harm to the animal's range; overutilization; disease or predation; inadequacy of existing regulations; and "other natural or manmade factors affecting its continued existence."

CCH argues that recent case law from the 9<sup>th</sup> Circuit suggests that NMFS must consider the potential impacts climate change may have on "all stages of honu life history." And, notwithstanding the optimistic view in the IUCN assessment, those impacts could well be devastating. CCH and other commenters reference studies that show sea level rise associated with warming oceans could wipe out or inundate 30 percent or more of the land mass of islets at French Frigate Shoals, where most of the green sea turtles nest. "Whale-Skate Island serves as a prime example of honu nesting habitat loss due to sea level rise," CCH notes. "Before 1997, Whale-Skate Island was the second largest honu nesting beach at French Frigate Shoals. By 1997, however, Whale-Skate Island eroded away and completely submerged underwater."

Whatever the effect of climate change, CCH states, "the precautionary principle must apply."

As for overutilization, that, too, is an ongoing condition, CCH notes. Not only are green turtles hooked by longline fishing vessels – in 2011, the incidental take limit of 4 turtles per year was exceeded by the shallow-set longline fishery – but near-shore fisheries and recreational users exact high tolls as well, accounting for about 12 percent of the turtles stranded between 1982 and 2003.

"Although fisheries interactions have declined," CCH continues, "NOAA should consider that Hawai'i's increasing population, expanding fisheries, and ever-expanding tourism economy might cause these threats to escalate."

CCH also takes exception with the petition statement that Hawai'i has regulations in place that will give the turtle adequate protection if it loses its federal status as threatened: "Even if the State of Hawai'i did have a management plan, many private citizens and environmental organizations have questioned the State of Hawai'i's ability to enforce a management plan that would continue to sustain honu population."

#### **Contrary to ESA**

The Hawaiian Civic Clubs' petition to delist proposes a two-step process. First, NMFS is asked to find that the Hawai'i green turtles constitute a "distinct population segment" (DPS), separate from the wider Pacific population of green turtles. Second, it is asked to find that this new DPS is healthy enough to

warrant removal from the protections afforded by the Endangered Species Act.

But the Conservation Council for Hawai'i raises the point that the petition to delist the Hawaiian green turtle and at the same time determine it to be a distinct population segment violates the ESA.

"Congress intended the DPS [distinct population segment] to provide a means to give species greater protection, when the data are limited to one segment of the species and not on the global level," it notes. "Logically, a population can only be listed if it is 'threatened' or 'endangered.' A species cannot be simultaneously imperiled and recovered. Therefore, if the [Fish and Wildlife Service] and [National Oceanic and Atmospheric Administration, NMFS' parent agency] decide to list honu as a DPS, the logic of the rule appears to require the agencies to also develop and implement a recovery plan pursuant to ESA."

In other words, the act of designating a DPS is a tool intended to protect small populations of species when their larger populations do not qualify for ESA protection.

**“The green sea turtle has and continues to be an important part of the marine and coastal ecosystem of Hawai'i.” — Lisa Croft, NMFS**

CCH notes that "previous attempts to use DPS Policy to delist species have resulted in considerable litigation. In such cases, courts within the 9<sup>th</sup> Circuit have preserved the ESA listing. For example, the United States District Court for the District of Oregon interpreted the DPS rule to mean that 'listing of population segments is a proactive measure to prevent the need for listing a species over a larger range – not a tactic for subdividing a larger population...'"

Defenders of Wildlife and the Sea Turtle Conservancy address the same point. "We agree that DPS designation can provide beneficial distinctions in protections needed between truly discrete populations," they state. "Nevertheless, we are concerned in this instance that DPS designation not be used improperly to carve out and prematurely diminish protections for species that do not meet the DPS criteria or have not fully recovered."

By law, NMFS must make a decision on the Hawaiian Civic Clubs' petition within one year of receiving it – in this case, by February 14, 2013.

#### **Meanwhile, in Hawai'i...**

Last spring, the Hawai'i Legislature's House Committee on Water, Land, and Ocean Resources held a hearing on a resolution that would have had the state urge NMFS to delist

the green turtle. Among other things, the resolution (House Resolution 61 and the identical House Concurrent Resolution 87) stated that the delisting was warranted because turtles had now recovered to the point that their numbers were *too* great and were inflicting harm on the environment.

Hundreds of individuals submitted testimony, with the overwhelming majority opposed to the resolution. Speaking in its favor were representatives of a number of Hawaiian Civic Clubs as well as the president of the association, Soulee Stroud. Many of those supporting the resolution repeated the claim that the environment was burdened by too many turtles.

That idea was rejected, however, by NMFS. Lisa Croft, deputy regional administrator of NMFS' Pacific Islands Regional Office in Honolulu, took the unusual step of submitting testimony disputing the claims.

"The resolutions state that 'the environment and ecosystem are suffering from the current over-protection, over-population, and lack of management of honu,'" she wrote. "The resolutions suggest that this is scientific

and accepted fact. However, it is not. The level of scientific study necessary to support the broad statement in the resolution is unavailable. The green sea turtle has and continues to be an important part of the marine and coastal ecosystem of Hawai'i, and it is inaccurate to assign broad environmental and ecosystem problems to the honu."

In his testimony on the resolution – which was eventually shelved – Stroud, the AOHCC president, singled out one Civic Club for special praise for its role in pushing for the delisting of the turtle: "We especially want to commend the Maunaloa Hawaiian Civic Club for their patient reviews and analyses of the honu situation and for bringing the resolution to [the AOHCC] convention for so many years." According to Stroud, the AOHCC had been discussing the turtle issue since 2007.

The Maunaloa Hawaiian Civic Club was formed in October 2006, just months before the AOHCC first took up the turtle delisting proposal. Since that time, Kitty Simonds, Wespac executive director, has served as its president, or *pelekikina*. Its vice president is Mark Mitsuyasu, a fishery program officer for the council. One of its four directors is Charles Ka'ai'ai, yet another Wespac employee. In all, of the eight named officers or directors of the club, three are directly employed by Wespac.

— Patricia Tummons

BOARD TALK

# Board Approves Management Plan, Accepts EA for Ka'u Forest Reserve

To many conservationists, the 61,600-acre Ka'u Forest Reserve on the Big Island contains some of the best forest in the state, particularly for native birds.

So when the state Board of Land and Natural Resources recently entertained a recommendation from its Division of Forestry and Wildlife (DOFAW) to approve a 15-year management plan for the reserve that proposed fencing off and actively managing 20 percent of the reserve, the Conservation Council for Hawai'i (CCH) and The Nature Conservancy of Hawai'i (TNCH) offered their enthusiastic support.

"The Ka'u Forest Reserve is the missing link ... between the forest bird habitats on the Big Island," CCH executive director Marjorie Ziegler told the Land Board at its September 28 meeting.

While her organization would have preferred that DOFAW protect the entire reserve for native species, "you have to start somewhere," and the plan does commit to protecting the upper half of the reserve for native species, Ziegler said.

TNCH's Mark Fox also testified in support of the plan, stating that it was "a pleasure and honor" for his organization to have had an

opportunity to participate in developing the plan. TNCH staff helped bring more than 80 members of the public to the forest "to see what this plan is all about," he said. TNCH manages four inholdings within the Ka'u forest totaling 3,500 acres.

In addition to fencing and weed control, the plan calls for developing and maintaining access roads for recreation, hunting, gathering, and other appropriate purposes, Fox said.

These other uses—hunting, in particular—were some of the main reasons why only a fraction of the reserve will be fenced, and this disturbed biologist and Big Island resident Rick Warshauer.

"None of the three management options presented (each is only 20 percent of the Ka'u FR total area) is anywhere close to what is needed to protect the most important array of biological resources on the island. The large scale option (fence and remove ungulates from all of Ka'u FR) was 'Dismissed from Further Consideration'. This was following a string of rational reasons within the same paragraph why the large-scale option should be done. The stated reasons for dismissal were concerns over adverse effects on hunting opportunities and cost," Warshauer wrote in his comments

on the plan's environmental assessment, prepared by Ron Terry of Geometrician Associates. (Terry serves on the board of directors for Environment Hawai'i, Inc.)

Warshauer called the preferred management option, which would require fencing off the middle-upper half of the reserve from ungulates, a "smart step in the right direction, unless it is the only step, which it appears to be."

The Ka'u FR is a proposed reintroduction site for the endangered 'alala (Hawaiian crow), which is extinct in the wild. Warshauer argued that more than 12,000 protected acres are needed to support a wild population of 'alala, which at times

travels to low elevations.

"To expect the 'alala to remain within the 12,000 acre safe zone is unrealistic, and having the surrounding forest reserve prioritized for non-protective uses is unfortunate for the birds," he wrote.

"[T]o restrict protective management, fencing and clearing of ungulates, to 12,000 acres is in effect to fragment the forest as it moves into the future, and to lose a great deal of these resources as a consequence," he wrote.

At the September meeting, Big Island Land Board member Robert Pacheco asked Fox what he thought DOFAW could do to minimize the deterioration of the Ka'u forest "so we don't end up with [just] one 12,000-acre piece that's good."

Fox said only that the state needs to follow Gov. Neil Abercrombie's "The Rain Follows the Forest" plan to manage core forest areas well and promote game management in appropriate areas.

"I apologize if this is a bit of a dodge," he said. "I'm not going to sit here and say fence 12,000 today and another 40,000 in [so many] years. I'm not qualified to say that."

The proposed plan was an important step in the right direction and should any more fencing be proposed for the area, it must go through rigorous public review, he said.

During scoping meetings for the plan, local hunters vociferously argued against fencing off even 12,000 acres. None testified against the plan at the Land Board's meeting in Honolulu.

Addressing DOFAW's approach to hunting in general, Ziegler argued that some of the agency's proposed rules "are just not aligned [with] what you are trying to accomplish in these sensitive native areas." In written testimony, Ziegler specifically mentioned DOFAW's bag limits, which she felt should be removed for all game species.

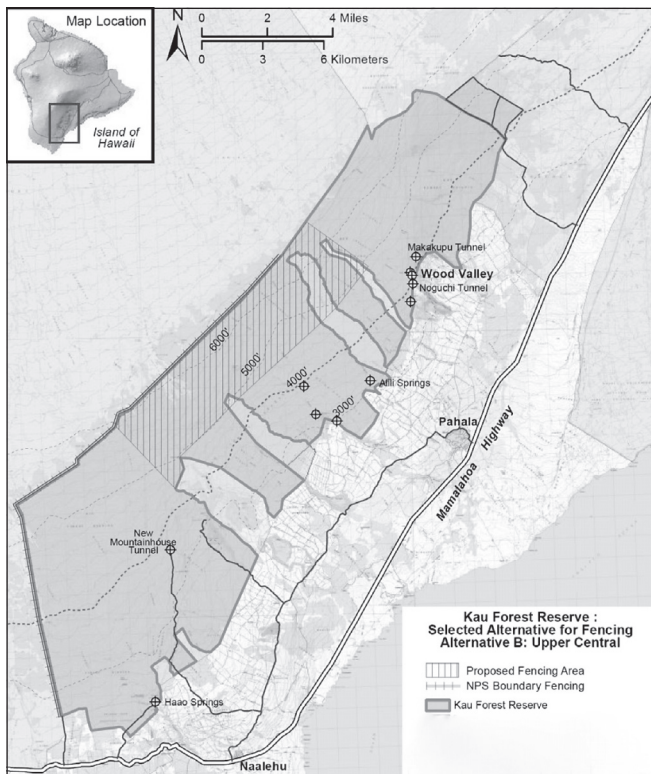
She also encouraged more fencing. CCH supports responsible hunting and responsible game management, she told the board, but "letting animals run where they want to run is not responsible game management."

Acting DOFAW administrator Roger Imoto told the board that his agency already has more than half a million dollars to implement the plan.

"It's a plan that's not just going to sit up on a shelf," he said. "We are actively getting rid of cattle in the area, getting access for hunters into the area, and working with private landowners."

The Land Board ultimately approved the plan and accepted the finding of no significant impact of its EA.

"This is exciting. I support the recommendation wholeheartedly and am looking for-



ward to a new year for the Ka'u forest," Pacheco said.



## Board Approves Management Plan For 'Ahihi-Kina'u Reserve

The majority of the 'Ahihi-Kina'u Natural Area Reserve has been closed since August 2008 and will remain so until at least August 2014. But if it ever opens again, management will be far stricter than it was in the days when some 250,000 visitors a year overran the place, using anchialine pools as toilets and crushing fragile corals underfoot.

The Land Board initially closed the reserve to protect the natural and cultural resources there from throngs of visitors and to prevent those crossing the remote, treacherous lava field to reach popular swimming coves from getting hurt. The reserve has remained closed because unexploded ordnance left by the U.S. Navy has been found and the U.S. Army Corps of Engineers is still evaluating the area.

In the meantime, the 'Ahihi-Kina'u NAR/Keone'o'io Advisory Group — a group of community members created by the Department of Land and Natural Resources — developed a management plan with help from DLNR staff, local and federal government officials, The Nature Conservancy of Hawai'i, and others.

On October 11, the Land Board approved the plan, which aims to build management capacity, manage human uses, control biological threats, and prevent land-based impacts.

Under the plan, the portion of the NAR that is currently closed will be accessible only under a special use permit or via a staff-led educational hike or service project. The ocean portion of the reserve would be closed at night and motorized vessels and anchoring would be prohibited at all times.

The plan also recommends establishing a parking or other user fee to fund the reserve's management. Without a fee, DOFAW will not be able to fund even the most basic management tasks and would fall hundreds of thousands of dollars short of what would be required to fully implement the plan.

The most important goal of the plan, to hire a new reserve manager, has already been achieved. DOFAW has recently hired David Quisenberry for the job. Quisenberry told the Land Board that a new volunteer coordinator has also been hired and that they are recruiting new volunteers and developing an interpretive program in accordance with the plan.

DOFAW is still awaiting a report from the U.S. Army Corps of Engineers on an ordnance survey conducted in the reserve last year. The report is expected to include recommendations to minimize the impacts of unexploded ordnance.



## DLNR Acquires Land For Honolulu Reserve

The Honolulu Watershed Forest Reserve is about to get a little larger.

On September 28, the Land Board voted to exchange its interest in four parcels in Niu Valley for the fee simple interest in one of them, which will be added to the forest reserve after the DLNR holds public hearings.

The 263-acre parcel has been valued at \$710,000, which is more than ten times the appraised value of the state's interest in the four parcels.

Until the board's decision, the Hawaiian Humane Society held a 52 percent interest in the parcels, the deeds for which required the organization to operate a public education preserve on the land "for flora and fauna." Otherwise, the land would go to the state for use as a park.

"This deed provision constitutes the state of Hawai'i's springing executory interest," states a DLNR Land Division report to the board.

The property had been in the Lucas family for several generations, according to Laura

Thompson, whose mother, Elisabeth Lucas, sold her interest in the parcels to the Hawai'i Humane Society more than 20 years ago.

"This is family property. ... My father and mother wanted to keep it the way it is," Thompson told the board. "Thank you for considering this."



## Wespac May Grant Aquatics Division \$450,000

The DLNR's Division of Aquatic Resources may be getting a windfall to improve its online reporting system for fishermen and fish dealers if the National Oceanic and Atmospheric Administration approves a \$1.8 million grant application from the Western Pacific Fishery Management Council (Wespac).

The application, submitted in August, seeks to add a new data coordinator position for Wespac and lists nine projects aimed at improving data collection for nearshore fisheries.

At \$457,000, developing, implementing and maintaining online reporting forms for fishermen and fish dealers is the priciest of the proposed projects.

On September 28, the Land Board unanimously approved a recommendation by the division to accept grant funding from Wespac should it become available. — *T.D.*

Environment



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## WHATEVER HAPPENED TO...

Tropic Land's Proposal to Build  
A Light Industrial Park in Lualualei?

One of the original owners of the infamous "purple spot" in West O'ahu's Lualualei Valley is under greater pressure to squeeze the most money out of the property now that he has lost his fight to keep his interest in Tropic Land, LLC, out of the reach of creditors.

On August 21, the U.S. Bankruptcy Appellate Panel of the 9<sup>th</sup> Circuit affirmed decisions by the U.S. Bankruptcy Court for the District of Hawaii that allowed Hawaii National Bank to collect \$2.4 million from Sunra Coffee, LLC, and Michael Nekoba.

Nekoba, owner of The Mortgage Group and a member of Sunra, is one of the three original principals of Tropic Land, which a few years ago proposed developing nearly 100 acres of agricultural land in Lualualei Valley into a light industrial park. State business registration records also list Nekoba as Tropic Land's agent. (Arick Yanagihara, a financial consultant at The Mortgage Group, is Tropic Land's project manager.)

The other Tropic Land investors were developer Tom Enomoto and entrepreneur Clyde Kaneshiro. Enomoto has since transferred his interest in the company to MS Sherwood, a company owned by his sister. In a declaration to the court, Nekoba stated that he, Enomoto, and Kaneshiro paid \$3 million for 260 acres in Lualualei Valley. Nekoba's contribution to the purchase was \$870,000.

According to attorneys representing Nekoba and HNB in the bankruptcy case, the bankruptcy appellate panel, or BAP, imposed a lien on Nekoba's interest in Tropic Land. Although a March 2011 writ of execution from the bankruptcy court suggests that Nekoba's interest was to be sold at public

auction within 60 days, Keith Yamada, HNB's attorney, says no deadline applies.

The bankruptcy action began after Sunra and Nekoba defaulted on an HNB loan for their Royal Hualalai Gardens development on the Big Island. The bank filed a complaint in 3<sup>rd</sup> Circuit Court in December 2008, which was moved to federal bankruptcy court about a year later.

The bank bought the 214-acre Hualalai property at a foreclosure auction, leaving Sunra and Nekoba with a remaining debt of \$2.4 million. The court issued a judgment against Sunra, Nekoba, and real estate investment company ADI, LLC, for that amount on September 23, 2010. (ADI, now defunct, was run by Sunra member Mariko Ejiri.)

When it came time to disclose his assets, Nekoba argued that his one-third interest in Tropic Land was off limits, since it was held jointly by his wife, Daryl.

"HNB argued that, as to Tropic Land, LLC, Nekoba had owned his member interest in that company for five years as an individual before transferring it to him and his wife on September 30, 2010, seven days after entry of the judgment against him on September 23, 2010," the BAP decision states.

In Honolulu, U.S. bankruptcy judge Robert Faris determined in October 2011 that Nekoba intended to "hinder, delay, or defraud" HNB when he transferred his interest to him and his wife. The bank was, therefore, entitled to "enforce its remedies as a judgment creditor" against Nekoba's interest in Tropic Land, Faris found.

Nekoba challenged the court's jurisdiction over the case, but both Faris and the

appellate panel found that his challenge came too late.

"[W]e agree with the bankruptcy court that it is simply too late for Nekoba to collaterally attack the bankruptcy court's subject matter jurisdiction, because the judgment is clearly final," the appellate panel wrote, noting that it wasn't until July 2011 that Nekoba changed his position on the merits of the case and challenged the court's authority.

The BAP decision heaps another large debt on Nekoba. Last year, along with Enomoto, the Sunra-related Two Tigers Fund, LLC, and others, Nekoba was found by a 1<sup>st</sup> Circuit judge to owe Central Pacific Bank roughly \$4 million for defaulting on a loan for the Bay View golf course in East O'ahu.

How these judgments will affect the proposed development on Tropic Land's property in Lualualei Valley is unclear. Neither Nekoba nor Yanagihara returned calls or emails by press time. Before any development can occur, the company will need the state Land Use Commission to redistrict the land from Agriculture to Urban.

On May 16, 2011, after a series of hearings, the LUC denied a petition from Tropic Land to amend its property's designation. On April 21, the LUC had voted 5-3 to approve a boundary amendment, but because six affirmative votes are needed, the commission effectively denied the petition.

Nekoba told the bankruptcy court last year, after the LUC's decision, that Tropic Land was looking for other uses of its property because the agency's rules prevented the company from reapplying for a boundary amendment for one year after a denial. It's been more than a year now since the LUC's decision, but no new petition had been filed as of mid-October.

In February, the Honolulu City Council voted to approve a new Wai'anae Sustainable Communities Plan, which allows the county to spot zone Tropic Land's property as Industrial. — T.D.