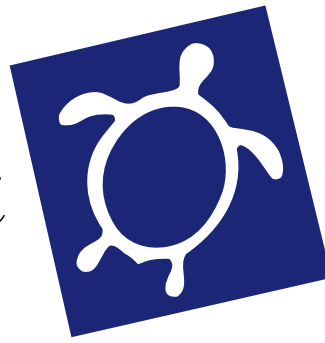


# Environment



# Hawai'i

*a monthly newsletter*

Price: \$5.00

## *The Heat Is On*

For decades, climate change was something whose effects most of us, to the extent we gave it any thought at all, thought would be visited on our grandkids or, maybe, our kids. Few of us imagined we'd have to deal with it in our own lifetimes.

And in that, we were oh so wrong.

As we note in this month's cover story, the coral bleaching events seen earlier this year in waters around Hawai'i are going to be increasingly frequent and ever more devastating. Globally, corals will have few refuges. Even areas that are now pristine or close to it will suffer as ocean water turns to acid and surface temperatures soar.

It thus becomes all the more important to defend the health of the reef wherever and whenever we can. In this regard, and for other reasons as well, the state's new rules to protect herbivorous fish in waters around Maui, discussed in the lead item in this month's "Board Talk" column, are a great step forward.

## In a Few Decades, No Corals Will Be Safe From Bleaching Events, Studies Forecast

The kind of massive coral bleaching event that afflicted 75 percent of the dominant coral species in O'ahu's Kane'ohe Bay in September is likely to become a regular occurrence within a few decades, according to modeling by scientists Jeff Maynard, Ruben van Hooionk, Derek Manzello, and Serge Planes.

Corals can usually withstand short temperature spikes, experts say, but if high temperature and bright light conditions persist for even a week or two, as they did last month, when water temperatures held steady in the mid-80s, the corals may bleach. Bleaching occurs when the toxic combination of high temperature and light cause coral to expel the zooxanthellae algae that live within it. And if stressful conditions extend over a prolonged period, the bleached corals can die, said Maynard, who spoke at this year's Hawai'i Conservation Conference in Honolulu.

At the conference, Maynard, a researcher at Cornell University, provided updated projections of the impacts of climate change on coral reefs.

The first—and, until recently, the only—projections were made in a 1999 paper by Australian biologist Ove Hoegh-Guldberg, who predicted that by 2050, tropical oceans would experience annual temperature anomalies several times more severe than those that occurred in the world's worst bleaching event in 1998, when 16 percent of all corals were lost, Maynard said.

So what do the models show today?

Under the "business-as-usual" climate prediction in the Intergovernmental Panel on Climate Change's (IPCC) 5th assessment report, known as Representative Concentration Pathway (RCP) 8.5, Maynard and his colleagues found that by the mid-2050s, all coral

to page 5

### IN THIS ISSUE

**2**

*New & Noteworthy:  
HFACT Facts, Cesspool Rules,  
And False Killer Whale Takes*

**3**

*Task Force, CWRM Question  
Navy's Management of Red Hill*

**6**

*Board Talk: New Rules  
For Maui Fishing; Homeless Help;  
And a Fine for the Volcano Circus*

**10**

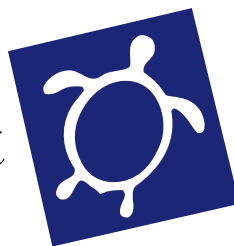
*Puna Circus, Hawai'i County Planners  
Tussle for Years Over Ag Lot Uses*



The state Division of Aquatic Resources' rapid response team surveying bleaching in Kane'ohe Bay.

PHOTO: COURTESY CAITLIN SEAVIEW SURVEY

# Environment



# Hawai'i

Volume 25, No. 5

November 2014

## NEW AND NOTEWORTHY

**HFACT Facts:** The newly minted Hawai'i Fishermen's Alliance for Conservation and Tradition made headlines in April 2013 when it petitioned the National Marine Fisheries Service to remove the North Pacific humpback whales from the federal list of endangered species. Its president, Philip Fernandez, told *Environment Hawai'i* at the time that his group had no affiliation at all with the Western Pacific Fishery Management Council, despite the presence on the HFACT board of two individuals closely allied with Wespac.

Less than six months after HFACT's incorporation, on September 1, 2013, Fernandez received a grant from NMFS for \$14,100. Under grant terms, Fernandez was to educate "marine users on the Endangered Species Act, the Marine Mammal Protection Act, the National Marine Sanctuaries Act... and the Magnuson-

Stevens Fisheries Conservation and Management Act." One means by which this was to be done was through creation of "web-based tools to assist fishers," including "a library of existing major laws" on the website.

The grant term expired on August 31. As of September, HFACT and Fernandez had two websites up and running. One, [hfact.wordpress.com](http://hfact.wordpress.com), had a "library" link, with no entries. The home page had two links to the same law ("The Federal Billfish Conservation Act" and "The Billfish Conservation Act"). The other, [hfact.org](http://hfact.org), had no link to any federal or state act relating to fishing. It did, however, discuss why "expanding the Pacific Islands marine national monument [is] wrong on all fronts," with links to no fewer than four Wespac statements on the subject.

**Cesspool Phaseout:** Describing cesspools as "little more than holes in the ground" and "an outmoded 15<sup>th</sup> century technology," the state Department of Health has proposed new rules that are intended to phase out the use of cesspools. Hawai'i has some 90,000 cesspools, the DOH states, and each year, approximately 800 new cesspools are installed.

But the proposed rules, which would require cesspools to be replaced with approved septic systems whenever a property is sold, have generated heated criticism, much of it from organizations representing real-estate brokers. They generally argue that the new rules would create a hardship for sellers, would not achieve the desired goal within any reasonable time

frame, and would discourage development (by prohibiting individual septic systems for developments of 16 or more subdivided lots).

The public comment period on the rules ended October 17.

**Take Limits on False Killer Whales:** The National Marine Fisheries Service has approved final rules authorizing takes of three endangered marine mammals by the Hawai'i longline fleet: sperm whales, humpback whales, and false killer whales.

Interactions with all three species are infrequent, and in the case of the first two, there is little concern that any harm to animals resulting from interactions with longline fishing gear will have an impact on the overall health of the species.

In the case of the population of Main Hawaiian Islands insular false killer whales, however, the number of individuals is so low—hovering around 150 at most—that serious injury to even one animal may harm the population's chance of recovery.

As expected, however, NMFS authorized the take of .3 of the MHI false killer whales per year—or one death or serious injury of a protected false killer whale every three years. It did so even though, by its own admission, preliminary data for recent years indicate that the level of takes by the fishery may be exceeding the level of injury that can be sustained by the population.

NMFS justified the allowed level of take with the argument that protective measures put in place in 2013, intended to reduce the impact of the fishery on the false killer whales, will have the desired effect.

"NMFS believes that the measures in place, coupled with the [False Killer Whale Take Reduction Team] process, provide a meaningful, adaptive management tool with which to quickly monitor, identify, and respond to any unanticipated longline fishery impacts to the Main Hawaiian Islands false killer whale population," it stated in the final rule, published in the *Federal Register* on October 16.

### Environment Hawai'i

190 Keawe Street, Suite 29  
Hilo, Hawai'i 96720

Patricia Tummons, *Editor*  
Teresa Dawson, *Staff Writer*

*Environment Hawai'i* is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$65 individual; \$100 non-profits, libraries; \$130 corporate. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 190 Keawe Street, Suite 29, Hilo, Hawai'i 96720. Telephone: 808 934-0115. Toll-free: 877-934-0130. E-mail: [ptummons@gmail.com](mailto:ptummons@gmail.com) Web page: <http://www.environment-hawaii.org> Twitter: [envhawaii](http://envhawaii)

*Environment Hawai'i* is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: For Color Publishing

Copyright © 2014 Environment Hawai'i, Inc.  
ISSN 1050-3285

*A publication of  
Environment Hawai'i, Inc.*

#### Officers

Patricia Tummons  
*President and  
Treasurer*

Ron Terry  
*Vice President*

Teresa Dawson  
*Secretary*

#### Directors

Kathy Baldwin  
Deborah Chang  
Mary Evanson  
Valerie Monson

### Quote of the Month

*"If we're poisoning our aquifers,  
that's not a form of defense."*

— *Kamana Beamer,  
Water Commissioner, on the  
U.S. Navy fuel tank leak at Red Hill*

## Navy's Answers About Red Hill Facility Raise More Questions About Contamination Potential

A Navy official blamed poor workmanship and poor quality control during routine repairs for the 27,000-gallon leak in January of jet fuel from a tank at the military's Red Hill fuel facility. Even so, he assured a state task force investigating the matter that other tanks that have been repaired the same way over the past decade or so are just fine—despite the fact that state Department of Health officials are finding contamination levels in a well near the facility that exceed safe drinking water standards.

The Navy reported earlier this year that it had spot-tested about four dozen of the more than 600 patches inside Tank 5 and found 17 had the potential to leak. At the Red Hill Task Force meeting on October 7, Navy Captain Mike Williamson said, “to be completely safe and make sure we’ve covered anything that could possibly go wrong,” the Navy’s contractor will now be vacuum-box testing all patches applied to Tank 5.

Williamson described how the Navy maintains its 20 underground storage tanks at Red Hill, each of which is 100 feet in diameter, 220 feet high, and 70 years old. He said that every couple of decades, the Navy takes three tanks out of operation, and then proceeds to clean, inspect, and repair them. Tank walls are tested for thickness using magnetic resonance imaging and ultrasonic testing, in addition to visual inspection. Quarter-inch plates are placed on thinned areas so that over the next two decades, the tank walls, which gradually corrode, will get no thinner than a tenth of an inch, he said.

“By the time you get back into the tank 20 years from now you want .1 inch left,” he said. Another Navy representative said that standard complies with those set by the American Petroleum Institute for above-ground tanks.

He said that work was stopped on the two other tanks taken out of service at the same time as Tank 5, while “we did forensics on Tank 5 [and identified] what processes, procedures, workmanship issues needed to be addressed.”

Gary Gill, head of the state Department of Health’s Environmental Health Administration, asked which tanks had already gone through the Navy’s repair cycle and when.

Williamson listed five tanks, in addition to Tank 5, that had gone through the “service life extension process.” Another Navy official estimated that the most recent round of repairs were done in 2000.

Steve Linder of the U.S. Environmental Protection Agency asked how many spots in Tank 14, one of the three that are currently out of operation, had been identified for repair or service life extension. Williamson did not have an answer, but said that that information would be included in an inspection report he would be submitting later.

Honolulu Board of Water Supply’s Ernest Lau asked how the Navy determined the rate of corrosion.

“We look at the last time this tank was touched, the wall thickness, and divide by 20 years,” Williamson said. “We’ve got a pretty good feel of the corrosion rate.”

“At some points in the tanks, the corrosion rates were 300-plus years before you hit that minimum. In places [where] you have a nick or a weld, in 70 years we’ve reached a threshold to put a plate on it. I don’t have an average rate. It’s specific to the tank. It varies from 20 years to 380 years or greater,” he said.

*“If you poke them too hard, they clam up and don’t have to tell you anything.”*

**— Linda Rosen, DOH**

In the case of Tank 5, Williamson said the Navy will ensure that qualified observers oversee the repairs full-time. When asked how long it will take to vacuum-box test the 600 “life extension” plates, he said, “as long as it’s going to take. There’s no rush. The purpose is to do it the right way.”

Both Gill and Linder asked Williamson about the accuracy of the technologies being used to measure wall thickness. Linder asked whether any feasibility studies on different techniques had been done to see which would provide the best resolution.

“Good question,” Williamson said. He answered simply that as technology progresses, the Navy would require contractors to implement the most current technology.

“We’ve requested the latest technology to be used in the tanks. Are we using the latest and greatest? I don’t know,” he said.

### **Water Monitoring**

Williamson acknowledged that total petroleum hydrocarbon diesel (TPHD) levels in its groundwater monitoring well Number 2, located near Tank 5, spiked around the time of the leak, as well as once during 2008.

The January spike reached action levels, but has since receded to historic levels, he said.

Gill noted that historic levels persistently show contamination. And according to an official with the DOH’s Hazard Evaluation and Emergency Response branch, those levels exceed the 100 parts per billion limit for drinking water or wells above a drinking water aquifer.

“In the last monitoring, it was 1200 ppb,” he said, adding that it has gone as low as 300 to 400 ppb. However, he said, the contamination doesn’t appear to be moving toward the Navy pump station.

Williamson admitted that the contamination was consistently above drinking water levels, but added that levels remain well below action levels in the Navy’s monitoring plan.

The HEER staffer tried to explain the discrepancy, stating that the Navy’s 2008 groundwater protection plan may have allowed TPHD levels to exceed safe drinking water levels because those standards are “always being revised”.

The Navy was to have completed the installation of two new monitoring wells to help track any migration of contaminants from the Red Hill facility. Aaron Poentis of the Naval Facilities Engineering Command

Hawai'i said the good news is that neither of the wells, which had already been drilled at the time of the meeting, showed any staining that might indicate contamination from either the January spill or any historical releases.

In addition, Williamson said the Navy planned last month to drill small holes in the base of Tank 5 to suck out with a vacuum box any fuel that might be trapped between the tank wall and the surrounding concrete. Any recovered product would also be age-tested, he said.

“As you know, I volunteered to do that myself,” Gill joked.

A plan for the Navy’s work at Red Hill has yet to be submitted to the task force. At the meeting, it was clear that Lau and Williamson disagreed on what its scope should be.

Williamson said the plan will address Tank 5 only. Lau, however, said he thought the plan should address how the entire 250-million gallon, 20-tank facility should be managed and how leaks should be monitored.

“We’ve been also clear that two wells is a good start but it shouldn’t end there,” Lau

said. “We don’t believe it’s adequate to characterize the site.”

Some are hoping the EPA’s proposed new regulations for underground storage tanks will prompt more changes at Red Hill. The rules require the installation of monitoring devices and double walls, as well as systems that address spills and overflow, among other things, in all field tanks. Those improvements would need to be completed within three years, according to BWS’s Barry Usagawa.

Linder said the EPA may adopt them some time within the next six months, but added that he wasn’t sure how they would affect the Red Hill facility. In any case, the state will still have to adopt administrative rules to mirror the federal rules.

Despite the pressure from Lau and others to improve the entire Red Hill facility, Williamson said it wouldn’t happen any time soon.

“It will probably take 20 years for us to fold in all the tanks into a secondary containment configuration,” he said.

The Navy has already addressed wall thinning in five tanks, he continued.

“In terms of those tanks leaking in the future, we’ve got a high degree of confidence ...

we’ve got a safe facility going forward,” he said.

When Red Hill will have secondary containment is “just a matter of when the technology is available that supports tanks of this size and configuration,” he said.

### Water Commission

At a meeting of the Commission on Water Resource Management held about a week before the task force meeting, commissioner Jonathan Starr wanted to know whether the Navy had admitted that having such a large, old, single-wall steel, underground facility, “in the middle of probably the state’s most productive aquifer and well fields,” was not sustainable.

“I think there’s some evidence they have a problem whether they admit it or not,” said commission geologist Patrick Casey, who represents the Water Commission on the task force.

“The tanks are pretty difficult to deal with. The Navy’s position is they will want to maintain them,” he said. “There’s some effort on their part to protect the resources.”

Starr said that given that the Navy has

staff about the role the Water Commission might play in enforcing laws to protect water.

“Can we enforce policy? ... I agree with Jonathan’s concerns. We are trustees of the water,” he said. He added that while he supported the defense of the country, “if we’re poisoning our aquifers, that’s not a form of defense.”

“The DOD has a serious budget. I’m not moved by the argument it’s going to cost a lot of money [to upgrade the tanks],” he said.

Water Commission director William Tam said the commission clearly has some authority here, adding that perhaps the commission could start a dialogue with the Navy on the maintenance and monitoring of the facility.

Starr said if there is ever again a major leak from the facility, and it makes its way to O’ahu’s drinking water supplies, it could “threaten the ability of Honolulu to continue as a great city.”

Rosen agreed that it would be appropriate for the Water Commission to encourage more

discussion with the Navy. She said the Navy needs to know all of the different parties that want to hold it accountable.

“One of the things frankly that concerns me, we can ask for transparency, we can ask for answers, that’s not always the way it works with the military,” she said. “They didn’t think they needed to tell anybody [about the leak].”

However, she added, “If you poke them too hard, they clam up and don’t have to tell you anything.”

Starr said that at the commission’s meeting in November, he would like staff to provide an analysis of the legal framework regarding the Water Commission’s responsibility and authority to press for action regarding Red Hill.

— T.D.



One of Red Hill’s underground storage tanks under construction in 1942.

PHOTO: U.S. ARMY CORPS OF ENGINEERS

not said that it will be replacing the tanks or lining them with a second wall, “what it sounds like to me is the Navy is stonewalling and they are going to continue to string us along until another one blows out and spills.”

“We’re looking at an existential situation,” he continued. He added that as a water commissioner, he felt some responsibility for protecting O’ahu’s water supply.

“To a certain extent, we’re responsible now that we know about it,” he said.

DOH director Linda Rosen, who also serves on the Water Commission, said the Navy has admitted that the tank leaked, but has not agreed on how serious an impact a future leak would have on the water supply.

Commissioner Kamana Beamer asked

*Coral continued from page 1*

reef areas — not just the tropics — are likely to experience annual events where water temperatures exceed baseline temperatures by at least six degrees Celsius for one week. This kind of event, known as a six-degree-heating week, is likely to cause severe coral bleaching, Maynard said, noting that, historically, six-degree-heating weeks have caused more than 50 percent of corals in affected areas to bleach.

According to maps prepared by Maynard and his colleagues, the waters around the Main Hawaiian Islands and Northwestern Hawaiian Islands will experience annual six-degree-heating weeks between 2040 and 2050.

If, somehow, greenhouse gas emissions decline drastically to a level that matches the IPCC's second-worst emission scenario (RCP 6.0), Maynard said, "the year in which six-degree-heating weeks would be exceeded annually is only pushed back two decades. It's not actually prevented."

To appease critics who thought the six-degree-heating week threshold was too low, Maynard said he and his colleagues ran models to predict when eight-degree-heating weeks would begin occurring annually.

In an eight-degree-heating week, intra- and inter-species differences in bleaching susceptibility matter much less and most coral species would bleach under such conditions during a summer or warm season, he said.

Maynard suggested that the stricter threshold mattered little. Once a place starts to experience annual six-degree-heating weeks, eight-degree-heating weeks follow just a few years later, he said.

Under the "business-as-usual" scenario, all coral reef areas will start experiencing annual eight-degree-heating weeks between 2030 and 2060, 90 percent of them before 2055, he said.

Reefs in the higher latitudes will suffer the events later than those closer to the equator, he added. In Hawai'i's case, the Main Hawaiian Islands will see annual eight-degree-heating weeks shortly before the Northwestern Hawaiian Islands do, according to Maynard's maps.

Even under the IPCC's two best-case scenarios for greenhouse gas emissions — scenarios Maynard suggests are completely unrealistic — "88.3 percent and 99.7 percent, respectively, of reef locations are projected to experience severe bleaching annually by 2100," Maynard, Hoodonk, Planes, and Manzello state in a paper published earlier this year in *Global Change Biology*.

In addition to looking at when reefs will start experiencing annual coral bleaching conditions, Maynard and his co-authors have

assessed when and to what extent reefs will start suffering from the effects of ocean acidification. As oceans become more acidic, corals and other marine species have a harder time calcifying.

The authors found that between now and when bleaching is expected to occur annually (around 2055), calcification is expected to decline between three and 17 percent.

Maynard's conference abstract states that if carbon dioxide levels continue to rise on the current course (the RCP 8.5 scenario), as early as 2034 all reefs will have experienced at least a permanent, five percent decline in calcification. High latitude reefs will experience it about 10 years earlier than those in low latitudes, Maynard said.

Maynard made it clear he was not judging which was worse for corals, bleaching or acidification. Rather, "we're looking at the interplay between declines in calcification and thermal stress induced bleaching," he said. "What we're finding is ... with current climate models and current scenarios, that there are no refugia from both threats this century."

He added that the newest climate models are thought to underestimate things like El Niño Southern Oscillation, "which means our projections may be too optimistic." However, he said, his projections don't consider the plausible possibility that temperature tolerance of corals will increase.

**Local Impacts and Solutions**

Hawai'i is having one of its hottest years on record and, according to state Division of Aquatic Resources administrator Frazier McGilvray, last September was one of the hottest since the 1940s. Although biologists say it's common for some corals in Hawai'i to bleach in the fall, the scale and scope of the event that occurred in late September and early October caught many off guard.

"This is above normal," said DAR's Anne Rosinski at a press conference at Kane'ohe Bay last month.

Not only were most corals in the bay experiencing some level of bleaching, from paling to going completely white, observers were seeing it in Lanikai, Waimanalo, Hanauma Bay, and Waikiki on O'ahu, as well as in waters off Maui and Hawai'i island.

Marine biologist Cynthia Hunter said the normal temperature range for Hawai'i waters is 77 to 78 degrees F. Temperature measurements off Lanikai indicate they had risen to the mid-80s in September and October.

Hunter said that the shallower corals have suffered more than those in deeper, darker waters.

Kim Hum of The Nature Conservancy of

Hawai'i added that other stressors, such as sediment, pollutants, and invasive algae, need to be managed so that when the ocean does warm or become more acidic as a result of climate change, the corals don't die.

Ruth Gates of the Hawai'i Institute of Marine Biology agreed.

"If it's just temperature, it's more hopeful. ... If it's all these things together, it's a disaster, she said.

Hum pointed to TNCH's relatively pristine reserve at Palmyra Atoll, 1,000 miles south of Hawai'i, as an example of how healthy reefs are better able to rebound from stressful events than unhealthy ones. After bleaching events, the corals there recover very quickly, and when they spawn again, there are places for the larvae to settle, she said.

"That's why it's so important to remove that [invasive] algae," she said.

For the past few years, TNCH has been using a vacuum device known as a "Super Sucker" to clear invasive algae from Kane'ohe Bay. Hunter suggested that healthy marine life is also needed.

"As corals are dying back, what's going to take its place? Alien algae. We need herbivores to be chewing up algae," she said.

If and when those stressors are brought under control, it will still be a very long time before the reef rebounds.

"Some of these colonies out there are a century old. That's how long they'll take to come back," McGilvray said.

—Teresa Dawson

*For Further Reading*

- *Environment Hawai'i* reported on Ove Hoegh-Guldberg's 1999 predictions on coral decline as a result of warming oceans. See "As Temperatures Rise, Corals Fall: The Effect of Climate Change on Reefs," August 1999.

- All of the coral bleaching and acidification maps prepared by Maynard and his co-authors can be viewed using Google Earth. A link to file can be found at [http://coralreefwatch.noaa.gov/climate/projections/piccc\\_oa\\_and\\_bleaching/index.php](http://coralreefwatch.noaa.gov/climate/projections/piccc_oa_and_bleaching/index.php). Their *Global Change Biology* paper can be found at [http://piccc.net/files/vanHoodonk\\_opposing\\_gradients.pdf](http://piccc.net/files/vanHoodonk_opposing_gradients.pdf).

BOARD TALK

# Rules to Protect Maui Parrotfish, Goatfish Win Land Board Approval By One Vote

Maui fisherman Darrell Tanaka teared up a little as he shook hands with his fellow supporters after the vote. The new rules he had initiated years ago to protect declining fish stocks around Maui had finally passed, albeit just barely. On the other hand, the small cadre of commercial fishermen who had shown up to oppose the rules seemed disgruntled.

In a 4-2 vote, the state Board of Land and Natural Resources voted on September 26 to adopt strict take limits for parrotfish (commonly known as uhu) and goatfish around Maui.

Under the new rules for goatfish:

- Up to 50 juvenile goatfish, or 'oama, may be taken in one day, and they may be taken only by hook-and-line fishing. None may be sold.

- For kumu (white saddle goatfish), moano kea (blue goatfish), and weke nono (red goatfish), none shorter than 12 inches may be taken, and no goatfish of any species shorter than eight inches may be taken.

- No one may take or possess more than two moano kea or munu (island goatfish) at any one time.

- No one may take or possess more than one kumu at any one time.

For parrotfish:

- No one may take or possess more than two of any type of parrotfish at any one time.

- No uhu 'ele'ele or uhu uliuli (large blue males) may be taken at all.

- No uhu palakaluka (redlip parrotfish) or uhu 'ahu'ula (female spectacled parrotfish) shorter than 14 inches may be taken. For all other parrotfish types, except for uhu 'ele'ele or uhu uliuli, the minimum size limit is 10 inches.

The state Department of Land and Natural Resources' Division of Aquatic Resources (DAR) had initially drafted new take limits for eleven types of fish, but after heated public hearings last year in which many people opposed the rules, the division narrowed its proposed rule package to cover just parrotfish and goatfish.

Maui DAR biologist Russell Sparks said the best scientific data shows clear evidence that fishing is driving the declines in the two types of fish. After the rules take effect, he continued, the fish populations will continue to be monitored for any changes. He added that a marine protected area established at Ka'anapali in 1999 to protect parrotfish and other species has resulted in a 140 percent increase in parrotfish biomass and a two to eight percent increase in the crustose coralline algae that cements the reef together.

Kaua'i Land Board member Tommy Oi asked why so many people had opposed the new rules during the public hearings held on Lana'i and Maui.

Sparks said those rules at one time included species of smaller schooling fish, such as menpachi, aholehole, and moi, and also included 'ulua. Some people worried that limiting take on the small schooling fish "would encroach on how they fish," Sparks said, while 'ulua fishermen worried that a daily bag limit would be difficult to track when they're out to sea for many days at a time. As a result, those species were removed from the package, he said.

The narrowed rule package now has 14 times more supporters than opponents, added DAR administrator Frazier McGilvray.

Those supporters included Maui Mayor Alan Arakawa.

In a letter to the Land Board, Arakawa, a self-professed lifelong diver, wrote that he had seen for himself the declines in parrotfish and goatfish from Maui reefs and that about three years ago, fishermen and representatives from Community Marine Managed Areas and the Maui Nui Marine Resource Council told him that parrotfish around Maui were being plundered.

In particular, three fishermen were using scuba to spear the sleeping fish at night, he continued.

"[B]oatloads of fish were being brought in for commercial sale, leaving very few on our reefs, where they serve the vital function of grazing algae, nibbling coral, and producing sand," he wrote.

"The new rules may seem onerous to those used to helping themselves to as much as possible of our natural resources in order to cash in on them. But it does not take scientific evidence to understand that this is neither a sensible nor sustainable behavior. We simply must take measures to ensure the protection and health of our coral reefs, and the intricate community of marine life that inhabits them," he wrote.

Tanaka, who says he was the primary driving force behind this the package, explained how he had tried to get strict bag limits for parrotfish and goatfish passed by the 2009 state Legislature. The bag limit bill passed unanimously in the Senate, he said, but was blocked by the House. Although the DAR had testified against the bill, it later took on the effort to set the new limits that were currently being proposed, he said.

Tanaka said the fish declines vary among shorelines. In Hana, for example, the fish are still there, he said. But at the more accessible areas, such as Wailea, Makena, and Lahaina, three- to five-pound kumu used to swim in front of the hotels there and "you don't see any of that now," he said.

"If you don't know the special spots, you won't bring home a kumu. When I was in high school, it was a certainty you could bring home a kumu in 10 feet of water," he said.

He said he didn't know whether the bag limits would bring the fish back, but explained that they were set to reflect the amount an average family would need for a night.

"The uhu, the kumu, the moano kea [are] over-hunted," he said. "Very few people could argue they are still in great abundance."

Hawai'i island Land Board member Stanley Roehrig admitted that when he used to dive in the 1960s, he would fill two gunny sacks worth of uhu.

"I was young and reckless," he said.



PHOTO: KEN-ICHI UEDA

A parrotfish within a marine reserve on Maui.

"I was once reckless myself. ... This is my way of giving back," Tanaka replied.

O'ahu commercial fisherman Makani Christensen was one of a handful who showed up to oppose the rule package. He argued that the edited rule package should have been presented at public hearings on Maui.

"I feed many people," he added. "These fishermen behind me feed many people. ... How do you feed an entire village with two fish if you only have one fisherman?"

He suggested that seasonal closures to

**"I was once reckless myself. ... This is my way of giving back." — Darrell Tanaka**

protect uhu spawning might be more effective than a bag limit that might last forever.

Maui fisherman Patrick Borge argued that there are plenty of uhu and blamed any declines on the fertilizer runoff from the hotels, inadequate freshwater flows, and night diving, among other things.

"They don't give the fish a chance. Control them," he said of the night divers.

Another commercial fisherman added that fish caught in his traps die from the bends as they are brought to the surface.

"Are we going to throw all these fish away except for two?" he asked. "We'll be just wasting fish left and right. It doesn't make any sense."

The most lengthy testimony against the proposed rules came not from the commercial fishermen, but from DAR biologist Alton Miyasaka, who spoke as an individual. He argued that despite claims to the contrary, neither parrotfish nor goatfish had been determined to be overfished nor subject to overfishing.

"The term 'overfished' is used freely by everyone from lay people to expert scientists, but what does this term mean? The federal Magnuson-Stevens Fishery Conservation Act has a definition of 'overfished' and this is the only U.S. government accepted definition there is," he wrote in testimony to the board.

The National Marine Fisheries Service has not declared the fish to be overfished or subject to overfishing, he wrote, adding that the agency has also established annual catch limits for all regulated species and "legal measures that are triggered if these ACLs are exceeded over a number of years."

He argued that the state does not know how many parrotfish or goatfish can be sustainably taken and without knowing that, "how do we measure if these rules were effective?" he asked.

"The commercial bag limits especially have a detrimental impact on the fishing indus-

try," he told the board. "There was no science that said that based on the level of fishing currently occurring you need a one- or two-fish bag limit. ... There are alternatives out there and those alternatives can be supported by commercial fishing," he said.

As good alternatives to DAR's proposed rules, Miyasaka suggested a maximum size limit to protect the largest fish, a ban on night-spearfishing of parrotfish, and rules customized for commercial and non-commercial fishermen.

During discussion, Land Board member Tommy Oi seemed to agree with Christensen that the public should have had an opportunity to testify at a public hearing on the revised rule package. Sparks countered that the revised rules were presented at small meetings across the county.

Board member Roehrig suggested amending the rules even further to simply restrict night fishing, but was told that would be a substantive change that would require further public hearings.

At-large member Chris Yuen, however, wanted to approve the rules, as is, that day.

"I'm not going to base anything on, 'I saw this and I saw that,'" he said, adding that he felt the data already presented showed that the fish populations have declined.

**"We want reefs that can rebound." — Russell Sparks, DAR biologist**

While there are various ways to address the declines, "people want us to do something. We're kidding ourselves if we think any proposal is not going to have opposition. If we had a ban on night spear-fishing in front of us, we would have the night spear-fishermen here," he said. "You will never have a [proposal] where everyone is holding hands together."

And with respect to the other contributors to the declines, Yuen said there are people working on controlling runoff.

"It's not like everything else is being ignored," he said.

In the end, Maui Land Board member Jimmy Gomes moved to approve the rules. While it was a hard decision, he said, the board needed to start somewhere. Otherwise, "we're just gonna keep bouncing around like a pinball machine," he said.

Gomes' motion passed, with Oi and Roehrig voting against it.

## **Ecosystem Health**

In an interview with *Environment Hawai'i*, Sparks addressed the "overfished/overfishing" issue.

He said, basically, the state is not required to manage fisheries the same way the federal government is. Traditional fisheries management, the kind described by Miyasaka, depends a lot on accurate catch reporting and that's not really available for most of the state's fisheries, he said.

A true stock assessment would "require a lot of data we just don't have," he said. But even without catch data, data on size distribution and life history of the fish can be enough to do some modeling and let you know the status of your stock, he said.

"There's all kinds of things you can do and try to stitch it all together. ... Parrotfish and goatfish are very attached to the reef and are very easy to census," he said.

In any case, determining sustainable harvest levels for parrotfish or goatfish, or any particular stock for that matter, is not necessarily the goal of the state's management efforts, Sparks suggested. Rather, the rules are meant to be a part of ecosystem-based management.

Under traditional fisheries management, a particular stock could be fished down to 30 percent of its original biomass before management actions are required, and that paradigm simply doesn't take into account the vital role parrotfish play in maintaining coral health, he said.

"Research has shown that reefs with higher levels for herbivory are more resilient after a stressful event," he said. "We want reefs that can rebound. If we get a hurricane this weekend, it's gonna damage massive amounts of reef, but if there are lots of herbivores, it will come back. If it's way out of balance, it will become overrun with algae and it won't recover."

\*\*\*

## **Board Decisions Aid City Effort To Address Homeless Issues**

On October 10, the Land Board unanimously voted to deny the petition for a contested case submitted by the Pacific Alliance to Stop Slavery (PASS). The organization was one of several opponents of the Land Board's decision in September to grant the City and County of Honolulu a permit to

establish a temporary homeless transition facility at Sand Island.

In denying the group's request, the board noted that the Department of the Attorney General had taken the position that PASS has no right to a contested case.

In a related matter, the Land Board temporarily handed over management of its beach at Fort DeRussy in Waikiki to the city. Department of Land and Natural Resources Land Division administrator Russell Tsuji explained that the area had been transferred via an executive order (EO) to the state Department of Transportation's Commercial Harbors Division. Because that agency no longer exists, the attorney general's office determined that the state has no rules to prohibit the camping and other activities occurring there, Tsuji said.

To address the issue, the Land Board voted in 2010 to cancel the EO and set the land aside to the DLNR's Division of Boating and Ocean Recreation. Despite the board's action, however, the cancellation and transfer was never completed.

In the meantime, the city's new prohibition on sitting or lying down on Waikiki sidewalks appeared to be causing homeless people in the area to relocate to the Fort DeRussy beach. So last month, the Land Division asked that the board to amend its 2010 action to allow the city to take over management for one year while the Land Division works out the land transfer.

"This isn't exactly a technical amendment, is it?" Hawai'i island board member Stanley Roehrig said after Tsuji had presented his request. "If we make this motion, we're clearing out all the homeless people from that beach."

Land Board chair and DLNR director William Aila tried to explain that the move was an effort to bring consistency to the management of Waikiki beach.

Even so, Roehrig lamented the domino effect the city's new ordinance was having.

"The city is outlawing the homeless in certain areas, they're trundling down the beach [to] the state beach in Waikiki. What are we going to do if we transfer it to the City and County? We gotta get a another piece of Sand Island?" he asked.

Aila tried to convince Roehrig that the motion was not simply patching up a hole in the city's ordinance enforcement, arguing that the lack of administrative rules for the Fort DeRussy parcel impacts everyone on Waikiki beach. He said there are illegal concessions on the property and the Land Board also has a fiduciary duty to protect lands in its inventory.

Roehrig said he believed the board has a

responsibility to "look at the big picture."

"If you don't have an answer, why should we pass this motion and we create a problem of our own doing without a solution?" he asked. "If I had my druthers, I'd like to provide more than just a rubber stamp for the Land Division."

In the end, however, he voted along with the rest of the Land Board in approving the Land Division's request.

(For more background on these rules, see our August 2013 "Board Talk" column, available at [www.environment-hawaii.org](http://www.environment-hawaii.org).)



## Maui Man Fined \$4,000 For Illegal Lay Netting

The state Division of Aquatic Resources' recommendation to fine a 57-year-old Maui man who barely spoke English \$4,000 for illegal lay netting — after a Maui judge found in his favor on the very same charge — didn't sit well with Hawai'i island Land Board member Stanley Roehrig.

But the rest of the Land Board voted on October 10 to approve the recommendation to fine Ernest Valdez for leaving his gill nets open and unattended.

DLNR marine law fellow David Sakoda explained that while the case was prosecuted in district court, which handles minor criminal charges, the per diem judge hearing the case didn't understand the tech-

Sakoda said that when confronted, Valdez said he knew about the laws against lay netting and argued that he was surround netting.

"We have an obvious question of double jeopardy here," said Roehrig, who said he was a public defender in the 1960s.

Valdez's son, who appeared before the board on behalf of his father, said Ernest had been told by state agents that as long as his nets are connected end to end, he's fine.

The DOCARE officer who cited Valdez told the Land Board that his nets were not connected to form a surround net and that he had left them at one point to go to the parking lot.

Roehrig still seemed concerned that a judge had believed Valdez's argument and acquitted him.

"We have a factual dispute here," Roehrig said.

Aila pointed out that unlike in a criminal case, where guilt must be beyond a reasonable doubt, the Land Board need only to base its decision on a preponderance of evidence.

Sakoda added, "We don't want to set this precedent that if you don't know [the law], we're just gonna let it slide. The fact that he may have intended to surround net, it doesn't matter. He left pieces unattended. In our eyes that's lay netting."

Roehrig again pointed out the judge's decision.

"Do we accept what you say or a finding

*"We have an obvious question of double jeopardy here."*  
— **Stanley Roehrig,**  
**Hawai'i island Land Board member**

nicalities of gear and fishing methods and found Valdez not guilty."

The fine being proposed was based roughly on the value of the resources taken: more than 140 fish, Sakoda said.

Although the nets used in gill netting (illegal) and surround netting (legal) are the same, lay net fishing leaves the net open and stationary. It's set in the water and whatever becomes entangled is harvested, he said. Surround netting is an active method; the nets are used to surround a school of fish, which are then gathered immediately, he said.

"It's clear from the observations in the [Division of Conservation and Resources Enforcement] report, the respondent had two nets. At any given time, the nets were always stationary, one or both were unattended," he said.

in a criminal court that he didn't do it?" Roehrig asked.

Sakoda argued that the criminal proceeding shouldn't factor into the board's decision at all. The civil violation before the board and the criminal case are "totally separate matters," he said. "Say we had never brought the criminal proceeding. ... The facts and rationale in this submittal should be the basis for the decision," he said.

After the Land Board discussed legal matters in executive session, Roehrig made a motion to defer a decision until the next meeting. In the meantime, he wanted a copy of the court transcript.

"If the judge found the defendant presented adequate evidence he was conducting surround netting [and] did not accept evidence submitted by state officers ... it



would set a bad precedent for this board to conduct these kinds of administrative findings on these cases because they look like civil cases but they also look like criminal cases," Roehrig said.

Although he received a second on his motion, he was the only one to vote for it.

Maui Land Board member Jimmy Gomes then moved to approve the fine as recommended by the DAR.

Roehrig said he thought the fine unreasonable, "given the situation that the accused is an older Filipino man that spoke limited English [and] given the fact that he had an interpreter in court. That sets a bad precedent." He said he would recommend a fine of no more than \$500.

At-large member Ulalia Woodside, however, said that the fines could have been much higher than \$4,000 and that DAR was "being reasonable given the size of the catch."

The board, except for Roehrig, approved DAR's recommendation. Aila advised Valdez's son of his father's right to a contested case hearing and said that because his father could not attend the Land Board meeting, the board would waive the requirement that the request first be made orally.



## Board Fines Big Island Circus, Affiliate \$50,000 for Violations on State Land

On September 26, the Land Board fined the Village Green Society, Ltd., and Hawai'i's Volcano Circus, Ltd., \$50,000 for the unauthorized clearing of unencumbered state land in Puna, Hawai'i, and for removal of 'ohi'a timber and construction of housing. The board also ordered the organizations to pay nearly \$4,000 in administrative costs and to remove any and all illegal structures within 90 days.

In the late 1990s, the circus, represented at the time by Graham Ellis, sought to lease the 60-acre parcel of state land, adjoining land owned by the Village Green Society, for educational and recreational purposes. The organization went so far as to draft an environmental assessment for the lease, but "[f]or reasons that are not clear from the file, the request for a lease was taken to the [Land] Board," states a report by the DLNR's Land Division to the board.

A decade later, the circus again sought to lease the same state parcel, but site inspections in February and October 2010 found

that structures and footpaths extending from the Village Green Society land had already been built. (The society is a non-profit group whose purpose, according to filings with the Department of Commerce and Consumer Affairs, is to generate revenue from its lands and to support the circus with those funds.)

The Land Division ordered Ellis to remove the structures and on November 18, 2010, the Land Board granted the society a right-of-entry to allow for the demolition.

During a follow-up inspection in January 2011, "Mr. Ellis pointed out several locations where structures had been removed and assured staff that all the structures on State land were gone," the report states.

However, complaints from nearby residents of illegal activities led the DLNR to inspect the site again this year. Agents with the department's Land Division and Division of Conservation and Resources Enforcement found that there were at least eight dwellings on the state's land and that Ellis appeared to be renting them out. Inspection reports suggest the dwellings, referred to as "Jungalows," were being rented for \$400-\$500 a month. In addition, "a large area of 'ohi'a forest was cleared out for a makeshift corral," the report states.

In a report on an inspection made in May, DLNR enforcement officer John Holley wrote that Ellis "began to show us where he wanted to lease the state parcel for the VGS additional parking. In all appearances I felt this was an attempt to stray us from the boundary inspection. I then related to him that we are not walking out onto the [1955] lava flow for no reason." While Ellis led Land Division agent Gordon Heit onto the flow anyway, Holley said he instead followed a trail leading to an unpermitted structure on state land.

"I then showed Heit the structure. I then stated to Ellis not to steer us away from the illegal structures as he was apparently attempting to do," Holley's report states.

Holley's report also states that Kevin Sulgit, a former maintenance worker fired by the society in 2010, told DLNR agents that under Ellis's direction he had cut 'ohi'a from state land.

"[He] stated that he was tasked with cutting down some of the 'ohi'a trees south of Graham Ellis's residence. Think this [the house] was part of the VGS property. His instructions were to clear the trees all the way out to the berm or to the 1955 lava flow," his report states.

Given the circus's and Ellis' "blatant disregard" for state laws, the Land Division recommended fining them \$5,000 for each

of the eight dwellings, \$5,000 for the roadway, and \$5,000 for the corral, as well as \$3,743 in administrative costs. The division also recommended that all of the improvements be removed.

The Land Division first brought its recommendations to the Land Board in August, but at the request of attorney Ted Hong, who represented the circus at the time, the matter was deferred. When the matter returned to the Land Board on September 26, Village Green Society president Eric Marantz requested another deferral, stating that it was not prepared to answer the Land Division's allegations. The circus's interim director, Dena Smith, also asked for a deferral, noting that Hawai'i Civil Defense had estimated that the encroaching lava flow in lower Puna would result in the closing of Pahoehoe highway on or near September 24.

"[I]t would not be prudent for us to send a representative to Honolulu at this time," she wrote. She added that the circus had no responsibility for any of the claimed encroachments and that it had been "mistakenly implicated in this matter."

At the Land Board's meeting, at-large member Ulalia Woodside asked Heit whether the fine included restitution for the 'ohi'a timber that was apparently taken from the state's property.

Heit said the DLNR's Division of Forestry and Wildlife would deal with that aspect of the case later.

Hawai'i island member Stanley Roehrig made a motion to defer voting on the matter as requested, but Land Board chair William Aila reminded the board that this was the second time the matter had come to the board.

"The entity has been told we would be hearing this at this time. They had an opportunity to present themselves," Aila said.

Heit added, "We did notify both entities, twice."

After Roehrig's motion failed to get a second, he moved to accept the Land Division's recommendations on the condition that the state was not waiving any future claims.

"The state reserves the right to hold those accountable ... who have worked on these projects on state land after assuring the state that they had stopped. We're going after all of the revenue they put in their pocket. ... We don't take it kindly that they did this," he said.

With that, the Land Board approved the motion. At-large member Chris Yuen had recused himself from the matter.

— Teresa Dawson

## Puna Circus Ringleader, County Planners Tussle for Years Over Ag Lot Uses, Buildings

For years, drivers on the old Red Road in lower Puna, the coastal highway running from Kalapana to Kapoho, have been treated to such unusual sights as jugglers practicing their craft on the sea cliffs and unicyclists pedaling unsteadily on the shoulder.

Most, if not all, of the performers are associated, one way or another, with the Village Green Society, Hawai'i's Volcano Circus, or Bellyacres. The first of these is a hui put together in the 1980s by around three dozen circus performers who settled on 10 acres of undeveloped land sandwiched between the remote Kalapana Seaview Estates subdivision, to the north and east, and state owned land to the west and south. The circus is identified in filings with the state as the beneficiary of income from the Village Green Society's land. The third, meanwhile, is the informal name for the community of performers that have settled on or near the land owned by Village Green. (Bellyacres is also claimed to be a land trust established in the late 1980s by the Village Green Society, but it is not registered with the state nor is it the owner of record for any real estate in Hawai'i.)

The circus, the society, and the community — all under the apparent (if not acknowledged) direction of self-described circus ringleader Graham Ellis — have brought controversy as well as color to the area. In addition to actions on the state land adjoining the Village Green lot that have resulted in sanctions and fines from the Board of Land and Natural Resources (described elsewhere in this issue), Ellis and his associates for years have run afoul of county rules and regulations.

Most of the recent controversy is over the use of a large administration and pavilion building called S.P.A.C.E. (for the Seaview Performing Arts Center for Education). In 2001, the county issued a special permit — needed because the land is in the state Agricultural District — to allow construction of a 7,900-square-foot facility on about 2.5 acres within the larger Village Green property. The Village Green Society and the circus executed a lease agreement, giving the circus the use of the smaller inholding for 99 years at \$10 a year. However, the land leased to the circus has not been subdivided nor is it described by any metes-and-bounds survey, and the lease itself has not been recorded with the state. What's more, all

county property taxes continue to be paid by the Village Green Society.

The permit conditions state that the building is to be used for rehearsals and training “to promote the healthy development of children and the community using the skills and fun of the circus.” Public performances were specifically *not* allowed, and Ellis had informed the Planning Department that there would be no amplified music.

In 2008, S.P.A.C.E. was completed, with a final interior area of around half of what was originally planned. Huge 'ohi'a posts support the main two-story pavilion, open to the air on three sides. In addition, the building includes offices, storage areas, a janitor's closet, and restrooms (connected to a cesspool). A commercial kitchen had been in the plans, but it was not built.

### *'Too bad if we didn't like it'*

Almost as soon as the building was completed, neighbors began to express their displeasure with its operations to Ellis and others involved with the facility. When Ellis did not address their concerns, in early 2010, they drafted a memo to the Hawai'i County Council member for the district, Emily Naeole-Beason. The Planning Department had erred in issuing a permit for the facility, they wrote; no similar facility would ever be allowed in a residential district in Hilo, they said. Nor was the building designed to contain the noise it generated, since it is open on three sides with an open roof-line on all four sides. “Significant noise in the form of drums, music, and voices are amplified with electronic equipment to the point where it has been measured at over 70 dB, whereas other residents ... are required to have noise no higher than 40 dB in accordance with Hawai'i Administrative Rules.”

A log submitted with the memo describes many of the incidents. One of the earliest occurred in March 2008. After a drumming event, the log states, Ellis met with complaining neighbors: “Graham [Ellis] said they were within the legal noise limits and that it was too bad if we didn't like it. ... He also said he had been here for 20 years and if we didn't like it, we should leave.”

The Planning Department also began receiving complaints. Among other things,

the complainants reported an adult burlesque show, jazz performances, and a weekly farmers' market were all held at the venue.

Yet other complaints to the county stated that the permittee had not complied with the special permit condition that all other structures on the larger 10-acre parcel receive building permits or be taken down. According to the complainants, not only were the unpermitted structures not taken down, still more had been built — including structures on the adjoining state parcel.

On March 1, 2010, the Planning Department sent Ellis a notice of non-compliance with terms of the special permit and a cease-and-desist order. The planning inspector, wrote Planning Director B.J. Leithead-Todd, had “observed 11 dwellings, of which possibly five are permitted.” She also instructed him on actions he needed to take to address the problems. Following a meeting between Leithead-Todd and Ellis on March 12, Ellis was allowed to continue operating the Saturday farmers' market and another Wednesday night bazaar “while S.P.A.C.E. representatives prepare an amendment” to the special permit. As to the other activities, Leithead-Todd prohibited any more public performances, commercial weddings, and advertised public events.

Ellis sought to relax the permit's absolute ban on entertainment. Couldn't the circus students continue “rehearsing their skills” during the markets and bazaars? he asked. Also, several of the complaints he was simply unable to address, “since they did not relate at all to S.P.A.C.E. but referred to activities on Village Green Society property over which Hawai'i's Volcano Circus has no authority.” For that same reason, he said, HVC could not comply with the Planning Department's requirement that it hire a surveyor to prepare a site map showing all buildings, setbacks, property lines, et cetera.

Despite Ellis's claim to have no authority over actions on Village Green property, in earlier dealings with the Planning Department he had reported on efforts to obtain building permits for existing structures on the Village Green land. In correspondence with the Planning Department in 2006, for example, Ellis “was pleased to report on our progress” in obtaining building permits for several of the buildings on Village Green property.”

Ellis informed the Planning Department he would be seeking to amend the special permit. In June 2010, Ellis, on behalf of the HVC and Village Green Society, submitted a proposal to allow development of a “Self-Sustainable Community Arts Center Dem-

onstration Model.” The amended permit would allow 12 public performances and 12 “circus show/dinner fundraisers” a year; a weekly farmers’ market and night bazaar; additional uses for the commercial kitchen (still to be built); other events; additional accommodations for “faculty, staff and interns/students;” and up to 72 students in the charter school using the pavilion.

The application included a list of structures on the premises – all of which, under terms of the original special permit, were to have been authorized with building permits by 2002. Structures listed in 2010 included eight “faculty/staff residences;” two “farm buildings;” two student bunkhouses; two greenhouses; two sheds; and a kitchen for staff and students. Of those, just five of the faculty residences and the two farm buildings had received building permits.

In the meantime, Ellis came up with a plan that involved using about four acres of the adjoining 59-acre parcel owned by the state. To do this, he needed a direct lease from the state, for which he prepared a draft environmental assessment. In fact, it was the second time Ellis had proposed to use the state land. Fourteen years earlier, the Office of Environmental Quality Control had published notice of availability of a draft environmental assessment to allow construction of administrative buildings on the land. Although a final EA was also published, that plan was dropped after Ellis apparently decided to apply for the county special permit.

The more recent draft EA for the use of state land stated that the circus would use about half an acre of the land for “overflow parking” for the farmers’ market. Future uses, the DEA stated, might include “enhancement of an educational, vocational, and/or industrial arts center, approximately 12 small and modest bunkhouses, bathroom or washroom areas...” That part of the state parcel not used would be stewarded by Ellis and his organizations, he said. But, like the earlier plan to use state land, this plan, too, seems to have been dropped.

Ted Hong, attorney for Village Green and the circus, explained this in a later filing with the Planning Department. After submitting a final EA to the state, Hong wrote, his clients were informed of the “pending timelines for various mapping information requested by DLNR and the notification and publication process required by DLNR in addition to the request to the Attorney General Office to prepare and execute the Direct Lease in conjunction with and the deadline imposed by the Planning Commission to complete the submittal of a [sic]

Amended Special Permit on or before December 2012.” In light of this, he continued, “the Applicant has chosen to direct its resources and effort to complete an Amended Special Permit at this time and pursue the Direct Lease with the DLNR at a later time.”

One unstated reason for the delay might be the fact that since 2010, Ellis and his associates had been suspected of using state land without appropriate permission — resulting in the investigations that led to the Board of Land and Natural Resources’ imposing fines and penalties against Ellis and his organizations in September of this year.

### Defiance

In early 2012, the county Planning Department was prodded into action once more after S.P.A.C.E. hosted events that seemed to be in out-and-out, knowing defiance of Planning Department instructions.

Neighbors of S.P.A.C.E. learned of plans for a two-day 25<sup>th</sup> anniversary party for Bellyacres and Village Green Society on February 24 and 25 and alerted the Planning Department. Although Ellis claimed it was a “private,” invitation-only event — and thus allowed under Planning Department rules for use of the facility — notice of the party on the groups’ website and in other media seemed to contradict this, providing information on how to obtain tickets and their cost, which would be in violation of the county’s cease-and-desist order issued two years earlier.



PHOTO: DLNR

One of the illegal structures on state land in Puna.

On February 24, Leithead-Todd advised Ellis to cancel the event, which, in her opinion, would not be a “personal party” or other use of the facility allowed under the special permit. Hong replied the same day, attaching two declarations – one by Graham Ellis and the other by Jenna Way, executive director of the circus – stating that they had invited only members of the Bellyacres ohana and the Village Green Society. Any other publicity “via blogs, community posts, or the like, ... was done without our consent or permission.”

The party was held. On March 12, Leithead-Todd mailed to Ellis out a “Notice of Non-Compliance” with special permit conditions and an order to show cause to the Windward Planning Commission as to why the permit should not be revoked. Three weeks later, she issued a second such notice based on S.P.A.C.E. continuing to host a weekly farmers’ market on Saturday mornings.

Environment  Hawai'i  
a monthly newsletter

Sign me up for a  new  renewal subscription at the  
 individual (\$65)  non-profits, libraries (\$100)  
 corporations (\$130)  economic downturn (\$40)

— I wish to make a donation of \$ \_\_\_\_\_ a month through my credit card account for 12 months.  
 (Fill out form below; minimum amount is \$10 a month)

To charge by phone, call toll free: 1-877-934-0130

For credit card payments: VISA or MC

Account No.: \_\_\_\_\_ Exp. Date: \_\_\_\_\_

Subscription Payment: \$ \_\_\_\_\_ One-time donation: \$ \_\_\_\_\_ Monthly authorization: \$ \_\_\_\_\_

Phone No.: \_\_\_\_\_ (expires after 12 months)

Signature of account holder \_\_\_\_\_

name \_\_\_\_\_

address \_\_\_\_\_


city, state, zip code \_\_\_\_\_

Mail form to:  
 Environment Hawai'i  
 190 Keawe Street, Suite 29  
 Hilo, HI 96720

We are a 501(c)(3) organization. All donations are tax-deductible to the extent allowed by law.



*Address Service Requested*

Printed on recycled paper 

In May 2012, the Windward Planning Commission heard the Planning Department's recommendation that it revoke the special permit. The outcome was a decision not to revoke the permit at this time, but to give the circus six months to come up with an acceptable application to amend the permit.

The permit amendment application, filed in November 2012, asks for the ability to hold 12 public performances and 12 evening fundraisers a year, increase the number of students allowed at the charter school held in S.P.A.C.E., build a certified commercial kitchen, and host an unspecified number of community meetings and "family events," among other things.

After a confused commission meeting in December 2012, however, the Planning Commission deferred further action until the Planning Department brought the matter back to the commissioners. Among other things, the Planning Department had informed Ellis that he would need to submit additional supporting information for the permit amendment, including, given the increases in traffic associated with expanded uses, a traffic impact study.

***A Ho'olaule'a?***

According to staff at the Planning Department, it is holding off any recommendation on Ellis's application to amend the special permit while it awaits submission of the information it has requested. In the meantime, Ellis continues to create problems for the department, even as he has relocated the farmers' market to "Uncle Robert's" settlement in Kalapana, several miles away, and has curbed many of the public performances, jazz events, celebrations, and the like at S.P.A.C.E.

Still, just last May, Ellis informed Duane Kanuha, director of the Planning Department, that "our organization is planning to hold a Ho'olaule'a at S.P.A.C.E. on June 6<sup>th</sup> to benefit the Hiccup Circus." He reminded Kanuha of the meeting attended by Kanuha, Mayor Billy Kenoi, and Ellis a month earlier, when Ellis "requested confirmation that organization of a Ho'olaule'a at S.P.A.C.E. would not be in conflict with our existing special permit." Ellis asked Kanuha "to confirm that this is the case."

"I respectfully wish to remind you," Ellis concluded, "that our organization ... still has not received a hearing date before the Planning Commission" on the application to amend the special permit. "Our organization needs to fundraise or we will have to terminate certain popular community services that we now provide for lower Puna residents."

Kanuha replied by email on May 13. First of all, he notes, Ellis had sent his original email request to County Council member Dru Kanuha (no relation to the planning director), who had then forwarded it on to Duane Kanuha.

"I certainly do recall our meeting in the Mayor's office," Duane Kanuha wrote, "and you did not request confirmation that organization of a fundraising event at S.P.A.C.E. would not be in conflict with your existing Special Permit, nor did I confirm any such request. What you did say was that fundraising opportunities were curtailed due to the ongoing permitting issues with S.P.A.C.E."

"You know as well as I that S.P.A.C.E. is under consideration to have your existing special permit revoked by the Planning Commission due to multiple and various violations of that permit, including but not limited to, unauthorized fundraising activi-

ties. That being the case, there is no way that I would have confirmed that your proposed fundraising event at S.P.A.C.E. could be sanctioned."

"With regard to your amended special permit application, you know perfectly well that there are certain requirements that have to be met before the application can be scheduled for Planning Commission [consideration] and those informational requirements have not been forthcoming."

***A Way Around?***

Shortly after the onset of his troubles with the Planning Department in 2010, Ellis helped to organize the Hawai'i Sustainable Community Alliance, a group that advocates for, among other things, relaxed building standards for rural dwellings on agricultural land.

In 2013, the HSCA helped develop a bill "relating to sustainable living" that would, in Ellis's words, "allow for the permitting of ecovillages, farms that accommodate interns studying agriculture, non-commercial composting toilets, grey water systems, and other research that serves to better prepare ourselves and our children for the inevitable effects of climate change." Last legislative session, the Senate version of the bill, SB2274, made it through both chambers but died in conference.

Although the bill would have allowed for relaxed building standards and expanded uses of parcels smaller than 15 acres in the state Agricultural and Rural land use districts, it would still have required permittees to obtain approvals from the county planning authorities.

— *Patricia Tummons*