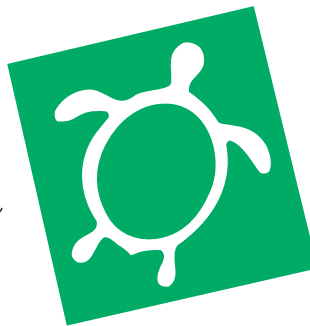


Environment



Hawai'i

a monthly newsletter

A Fishing Derby — For Bigeye

As longline fishers find themselves up against a shrinking quota, and with ever more vessels in the longline fleet, the Hawai'i fishery for prized bigeye tuna is taking on all the hallmarks of a derby.

And that's not a good thing.

In the race to catch as many fish as possible, as soon as possible, fishers are hurt as prices over the short-term crash. Both fishers and customers face the prospect of scarcity after the quota is hit.

Most of all, the resource itself – bigeye tuna – suffers increased harm. Already overfished, the likelihood that its population will rebound grows dimmer with each day Honolulu's fleet lands 20 tons of the prized fish at the Pier 38 auction. But hey, it's good while it lasts, no?

Wespac Seeks to Further Expand Bigeye Tuna Quotas for U.S. Fleets

At a time when the bigeye tuna stock in the Western and Central Pacific is being overfished — and by some standards, is already in an overfished state — the Western Pacific Fishery Management Council last month asked the National Marine Fisheries Service to find ways for the U.S. purse-seine and longline fleets to catch more than what federal and international conservation measures currently allow.

And this comes at a time when NMFS is facing a strong challenge in federal court to a rule the agency proposed last year allowing the Hawai'i longline fleet to use, as a kind of slush fund, bigeye catches attributed to the territories of Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa once the fleet has hit the U.S. bigeye tuna quota set by the Western and Central Pacific Fisheries Commission (WCPFC).

Under the WCPFC's current tuna conservation and management measure, the United States longline fleet may catch up to 3,554 metric tons (mt) of bigeye this year. That tonnage is further reduced by 52 mt, however — the amount by which the longline catch exceeded the quota last year. If the measure remains unchanged, the quota will be lowered to 3,395 mt in 2017.

In previous years, when the quota was 3,763 mt, the Hawai'i longline fleet, aided by Congress and NMFS, took advantage of what some perceived to be a gray area surrounding the way the WCPFC treats the U.S. Pacific Island territories. As Wespac put it in a recent press release, "Under the WCPFC, the U.S. territories of American Samoa, Guam and the CNMI, as well as the Pacific territories of other nations, are treated as a Small Island Developing State

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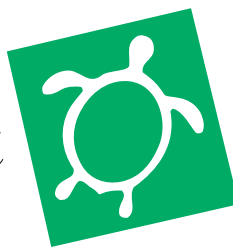
By all accounts, the Hawai'i longline fleet is catching bigeye tuna (pictured here) at a record pace, raising concerns among fishers and fishery managers that it could hit its quota for the Western and Central Pacific at the end of August.

PHOTO: NOAA

Environment Hawai'i

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NEW AND NOTEWORTHY

Moving Targets: Four years ago, the Hawai'i Clean Energy Initiative issued a "road map" identifying strategies for reducing the use of fossil fuels in the transportation sector. So how is that working out?

Last month, the state released a draft report on progress toward those goals. And the news isn't very good.

The road map had a target of reducing vehicle miles traveled in 2015 a modest 2 percent from miles traveled in 2010. Instead, there was a 14 percent increase in the 12 months covered in the report (spanning 2014 and 2015).

In 2010, 496 million gallons of fuel were consumed by cars and trucks in Hawai'i. The road map had no interim target for 2015, but it's pretty safe to say that the 5 percent increase in fuel consumption seen in



PHOTO:MARIO DO

2014 is not the direction the Clean Energy Initiative had in mind.

The goal was to have 4,000 electric vehicles sold in 2015, with 10,000 on the road by 2015. Instead, sales of EVs amounted to just 1,000 in the last year, with only 3,400 on the road.

Improved vehicle efficiency was another target, and this was one that Hawai'i managed to achieve, and then some. The 2015 target was 25 miles per gallon for cars and 18 mpg for light trucks, and instead the average mileage for 2014-2015 was 30 mpg for cars and 23 for light trucks, rates that actually exceed the road map's target for 2020.

The report is available online. Go to: <http://www.hawaiicleanenergyinitiative.org>. Click on the link to "charettes" and select "transportation." That will take you to the page that links to the draft report.

NARS Hit is Official: As *Environment Hawai'i* reported last month, one of the

most significant environmental bills of the 2015 legislative session was Senate Bill 1299. As passed by the Senate and House, the bill brings to a halt the distribution of 25 percent of revenue from the conveyance tax, on sales of real property, to support the state's Natural Area Reserve Systems, its watershed partnerships, and its natural area partnership and forest stewardship partnership programs.

Governor David Ige signed the measure into law on June 5.

Now, instead of having a dedicated, year-to-year source of funding for these programs, vital to protecting Hawai'i's long-term environmental health as well as both the quality and quantity of its fresh-water sources, advocates for these programs will have to compete annually at the Legislature for the resources needed to carry them out.

This year, after excising these programs from the conveyance tax, the Legislature awarded \$7.5 million a year for the next two years to manage the 124,000 acres in the state's Natural Area Resources and even more in its watershed management areas; \$2.8 million a year for natural area partnerships, forest stewardship partnerships, and management of the state's 580,000 acres of forest reserve lands; and \$3.4 million a year for the department's programs to protect endangered species and fight fires.

Save the Date: *Environment Hawai'i* is celebrating its 25th anniversary with a dinner on August 14. Our special guest speaker will be Chip Fletcher, who will be speaking on "The Climate Crisis: A Review and Update."

The event, including a silent auction, live music, and cash bar, will be held at the 'Imiloa Astronomy Center in Hilo. Doors open at 6 p.m.

Tickets are \$65, which includes a \$20 tax-deductible donation to *Environment Hawai'i*.

To reserve your seat, call 808 934-0115 or email ptummons@gmail.com.

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Quote of the Month

*"Maybe the science is all wrong.
This 'overfishing' has been
going on for 20 years.
So why are we calling it overfishing?"*

— **Kitty Simonds, Wespac**

BOARD TALK

Board Facilitates Removal of Encroachments, While Expanding an Easement for Another

The ocean is rising. The state is getting more land every year,” said board member Stanley Roehrig at the May 8 meeting of the state Board of Land and Natural Resources.

Indeed, in May, *Environment Hawai'i* detailed how, more and more, the shoreline certification process is identifying properties in need of an easement from the Land Board to legitimize encroaching, but legally built, structures. (Under state law, the state owns everything up to the highest wash of the waves.)

That same month, the Land Board approved additions to yet another such ease-

ment in 2001 to Evershine VIII, L.P. for a channel, a concrete breakwater, and a seawall and fill that encompassed about 21,000 square feet. The company paid \$58,000 for the easement, which was issued in October 2003.

Five years later, the company paid an additional \$1,060 to add 384 square feet to the easement area and to include steps to the beach as one of the allowed uses.

The property's current owner is planning some major construction near the shore and in seeking a shoreline certification, the state's shoreline team determined that portions of the seawall and footing are outside

additional encroachments in the easement would be prudent,” the report states.

At the Land Board's meeting, Land Division administrator Russell Tsuji explained that the new easement areas were being added because the shoreline has moved.

“Now, all of a sudden, things are seaward of the shoreline,” he said.

To make sure those areas are covered by liability insurance, they are being added to the easement, he said.

The Land Board unanimously approved the easement amendment. Once an appraisal is done, Evershine will again have to pay for the additional area. The easement is non-exclusive, meaning that the public can traverse the area.

Dan Purcell, a member of the public, requested a contested case hearing on the easement, but, according to Land Division staff, he did not follow up with a written petition.

“Now, all of a sudden, things are seaward of the shoreline.”

— **Russell Tsuji, DLNR**

ment, this one to the owner of the former Henry Kaiser estate in Portlock, O'ahu.

But the Land Board hasn't just been allowing shoreline encroachments to stay. The board has also recently granted three right-of entry permits to apartment complexes on Maui and a Waikiki hotel that plan to remove their encroachments from the beach.

An Addition

On May 8, the Land Board approved a request from Evershine II, L.P., the development group that owns the former Kaiser estate, to expand its 55-year easement by about 3,500 square feet to cover shoreline encroachments recently discovered during efforts to build on the property.

The Land Board approved the original

the easement boundary, a Department of Land and Natural Resources Land Division report states.

Also, for safety purposes, Evershine II plans to keep several offshore navigational markers that were not included in the original easement and requested adding them, as well.

Following discussions among Evershine representatives and the DLNR's Land Division, Office of Conservation and Coastal Lands, and the Land Survey Division of the Department of Accounting and General Services, “it was decided that including the

Removals

At the same meeting, the Land Board approved a 60-day right-of-entry permit to the Association of Apartment Owners of Napili Surf in Lahaina, Maui, to remove encroachments covering some 5,000 square feet, including a shower, fencing, concrete pads, and a bench.

In a separate item, the board voted to grant a right-of-entry permit to ORF, LLC, giving it 90 days to remove 12 tiki torches and a single concrete step fronting the Outrigger Reef Waikiki Beach Resort. The company must also deposit \$17,000 into an escrow account to cover the removal. Should the company fail to remove the encroachments in the meantime, the DLNR may remove them on its own using the funds in escrow.

In the case of Hale Ka'anapali on Maui,

Makai views from Evershine II's property at Portlock.



which the Land Board took up later that month, the county Special Management Area permit process identified artificially induced vegetation that encroached onto the state beach. Under the state law that requires landowners to keep beach transit corridors free from such obstructions, the condominium is being required to remove some 2,300 square feet of naupaka from the beach.

On May 22, the Land Board approved a 30-day right-of-entry permit to the Association of Apartment Owners of Hale Ka'anapali to allow for the removal.

Unless and until the encroachment is removed, the AOA will be unable to have its shoreline certified, a requirement of the SMA permit process.

Work is expected to begin in September.



Church Loses Kapa'a Lease, Despite Testimony of Board Member

After no fewer than 50 notices of default had been issued over the past 20 years, the Land Board finally terminated on May 22 a lease for land in Kapa'a, Kaua'i, used by Tenrikyo Taiheiyō Kyokai for a church and "allied purposes."

The church had a rental delinquency totaling several thousand dollars, according to Land Division staff. Although the church paid \$4,553 of it shortly before the meeting, about \$121.41 in back rent remained and a new rental payment of \$1,000 was due soon.

Despite the recent payment and the fact that the division was dealing with relatively small dollar amounts compared to some leases, Kaua'i District land agent Marvin Mikasa recommended proceeding with forfeiture given the property's history.

"Apparently there was a lot of different types of default," Land Division administrator Russell Tsuji told the board. The tenant failed to keep the property in a sanitary condition and built within the county setback without county permits, according to DLNR staff.

When it came time to discuss the matter, Kaua'i Land Board member Tommy Oi, a former land agent, recused himself, saying he had worked for many years with the family who runs the church and had tried to help it resolve its lease issues. He also later stated that he worked on construction jobs with the church's former reverend, Nobunao Hamada.

But once the other Land Board members

started asking questions, Oi joined in the discussion, explaining the history of the church's tenancy and why it had been allowed to stay for so long despite the repeated rental delinquencies.

Deputy attorney general William Wynhoff then reminded Oi that he had recused himself and suggested that it would be more appropriate for him to make his comments from the other side of the table, where members of the public testify.

"I'd just feel a little more comfortable," Wynhoff said.

Oi, as a member of the public, later went on to explain that Nobunao Hamada spoke no English and his family struggled to pay the rent after the DLNR raised it years ago. He added that a daughter in Honolulu would sometimes pick up the bill.

Charlotte Hamada, who took over her husband's position four years ago, admitted that she was "a very bad accountant" when it came to the rent, but defended the work of her church, which has taken in abused children, beggars, and drug addicts.

"We don't get paid for our job from Japan," where the church is headquartered, she said.

She said she planned to eventually move back to Honolulu, but asked the board to let her family stay on the Kapa'a property just a few more years. Before that, her son Chad, who lives on O'ahu, would move to Kaua'i to take over the church.

As she and Chad detailed activities on the property, it became clear that at least some of the people living there were not exactly welcome and were unruly, to say the least.

"My oldest son, who is in jail now for abusing my husband, he brings all kind of drug people [into] that back house," she told the board.

When Hawai'i island board member Stanley Roehrig asked how many people were in the church's congregation, she said only her family.

How about other people, the homeless? Roehrig asked.

Chad said that the homeless people stay in the back house and are supposed to come to services, but "my parents are so old, people are trying to hit them."

"The people my dad did help, it's not in the hundreds, but they are people [doing well] in the community," he said.

Although he had not yet been approved to take over the church, Chad said he planned to help finance and run it.

When Roehrig asked Chad how he planned to keep the disruptive people out, he replied, "Trust me. ... I go home every month for the last 15 years to clean everything

up, to prepare for the next service. They scatter because I will not let that happen to my parents."

Maui Land Board member Jimmy Gomes didn't seem assured by that.

"You still go back once a month, everyone scatters. Once you have your service, they will go back again," Gomes said.

While he supported the intent of the church, Gomes said, "Personally, I see you have a sore and it's not healing. It's still bleeding."

Chad agreed and said the Land Board had every right to deny his mother's request, but still asked that he be given a chance to turn things around.

Gomes chided, "I'd be pulling my mom out of there and bringing them to Honolulu."

Oi testified that there have always been drug-related crimes in the area, particularly in nearby Kapa'a park. He also urged the board to reconsider.

"All I trying to say, I cannot see getting rid of these people. They going be homeless. You're just creating another problem," he said.

"Although it was part of my job to get rid of these guys ... I try to resolve the situation. I cannot see kicking out one church that was something to help the community," he said.

Jennifer Jasper, who lives next door to the church, had an entirely different take.

"I have been harassed, my house has been burnt. I have been shot at. ... The neighbor has been burglarized" she said, adding that the police cars come to the property six at a time in the middle of the day and on weekends.

"A man walked out from their yard plain naked," she said.

"I get called a f-n whatever. When I'm in the garden, they say get the f- back in your house," she said.

"We call the cops all the time. The drug activity, everybody knows, even the fishermen tell their children to stay away from this house because of the drug dealing. ... Everybody knows and none of you have helped me," she said, adding that she feared for her life. "I can tell you right now I'm going to get retaliation when I get home. ... These people are acting very nice. It's a different scenario at home."

The friction between Jasper and the Hamadas was palpable in the board room; a few heated comments were exchanged.

Roehrig, a lawyer, seemed sympathetic to Jasper's plight, noting that he had a case where homeless people living in a self-storage space "terrorized the countryside"

and one of them struck his client in the head with a cow bone.

"He's lolo right now. It's not a small thing," Roehrig said.

Although Roehrig suggested deferring the matter to give Chad a chance to bring order to the property, the rest of the board favored termination.

Land Board chair Suzanne Case said she was concerned with the long history of violations and that it didn't seem fair to members of the public who were being affected by those violations.

In the end, the Land Board unanimously approved the lease termination.



A Settlement for Coral Damage

Sea Sport Cruises, Inc., (SSC) will pay the state \$7,000 for coral damage caused in September 2013 when its 149-passenger catamaran *Ocean Odyssey* grounded near Ma'alaea Harbor, Maui. On June 12, the Land Board approved the fine recommended by the DLNR's Division of Aquatic Resources (DAR).

According to a staff report, DAR based the fine on a value established in a 2007 case in which a coral reef was scarred by an anchor. The damaged area was valued at \$140 per square meter.

Using that standard, the DAR calculated the \$7,000 fine based on a damaged area of 47 square meters.

A staff report notes that SSC "took prudent measures to mitigate and avoid further damage by flooding the vessel to minimize movement ... in the surf while awaiting salvage."

During discussion, Land Board member Ulalia Woodside seemed interested in pushing for a more current assessment of coral value. She asked DAR acting administrator Alton Miyasaka whether his division ever planned to revisit the \$140/square meter standard and adjust it to account for inflation.

Miyasaka responded that the value of the damaged area actually depends more on the quality of habitat affected.

So, no accounting for inflation? Wooside asked.

"That's built into that, the value is the current value we see in it. It's based on things like what species it is, how rare, how big a damage, the area in which it's in. We have a base amount per square foot, then we adjust," he said.

"But that base hasn't changed in a while," she said.



A view of Kawela Point from the Turtle Bay Resort.



Gov. Signs Turtle Bay Bill

On June 12, Governor David Ige signed Senate Bill 284, allowing for the permanent protection of 665 acres of coastal land surrounding the Turtle Bay Resort on O'ahu's North Shore. The \$45 million acquisition will still require approval of the state Board of Land and Natural Resources, which is expected to vote on the matter soon.

At a briefing before the Land Board that day, state Attorney General Douglas Chin said that with the governor's signature, the state was a step closer to resolving a decades-old controversy that began when the Kahuku sugar mill closed in the 1960s.

The interest in development and job promotion that followed resulted in agricultural land being rezoned to allow resort development. And when previous owners of the resort moved to act on the entitlements several years ago, it resulted in a number of lawsuits, as well as strong community opposition.

"It's resulted in several litigations, several controversies that will hopefully be resolved," he said.

Under the purchase allowed by SB 284 (now Act 121), the state will acquire the fee interest in 52.8 acres of land. About 570 acres would be owned by the resort, but would be covered by a perpetual conservation easement held by the state.

The state will contribute \$35 million, or 78 percent of the total cost. The City and County of Honolulu is contributing \$7.5 million for a small portion of land, and the nonprofit Trust for Public Land, with Army funding, will provide \$2.5 million to

complete the transaction.

The easement terms will require the resort to maintain and accept liability for the area.

"It's not meant to be an active park. It is a green space that contains about eight miles of pathways. You would be able to walk through and enjoy an area that is essentially preserved and conserved," Chin said.

The state also plans to issue a 65-year lease to the resort for the fee area, which also requires the resort to assume liability and the responsibility to maintain the land in a certain condition and provide public access.

What's more, the purchase agreement includes a commitment from the resort to provide 80 public parking spaces and to allow the Kahuku High School golf team to play for free during daylight hours.

One parcel originally targeted for protection, on the Kahuku side of the resort, is not included in the deal. Chin said it was "left out there as an additional portion that could be worked out." The state or other agencies have until December 2017 to finalize an agreement to buy that property. Parties involved in the current purchase just don't have the money for it right now, he explained.

Land Board member Keoni Downing asked resort representative Drew Stotesbury whether that deadline could be pushed further, but Stotesbury was adamant that the option will cease at the end of 2017.

Chin noted that Kawela Point was being saved. He said it was the "crown jewel in terms of development potential, as well as potential for a public park type area." The two parcels that make up the Kawela portion accounted for the vast majority of the purchase price, he said.

"It is a great relief to know that area will not have a big hotel all over it," although the resort still has the ability to build two new hotels on its remaining land, he said. — T.D.

Program to 'Democratize Clean Energy' Has Yet to Deliver on Promise of PV

The Department of Business, Economic Development, and Tourism (DBEDT) has issued its first "true-up" for the Green Energy Market Securitization (GEMS) bonds. The true-up, a required element of the program approved by the Public Utilities Commission, is a periodic accounting of funds received from the Green Infrastructure Fee, or GIF.

Those collections, which are paid by customers of Hawaiian Electric utilities on O'ahu, Maui and the Big Island, are weighed against the payments due on the \$150 million bond DBEDT took out last November to finance the GEMS program. As *Environment Hawai'i* reported in March, GEMS is intended primarily to help underserved utility customers reap the benefits of solar energy and other green energy technologies.

According to the May 29 report, the utilities' daily payments to the fund trustee amount to more than \$61,000. Collections from last December, when the fee began to appear on utility bills, through the end of June were expected to total around \$7.4 million.

The bond payment, due July 1, is around \$7.1 million. The excess amount collected is to be applied to the next periodic payment, with the GIF that is to be levied on ratepayers adjusted to reflect that excess.

In addition to the bond payments, DBEDT lists additional charges to be paid by GIF revenue. These ongoing "financing costs" include "trustee fees and expenses" of around \$32,000 every six months; "departmental legal, consulting, and accounting fees"

of more than \$6,000; "service provider legal and accounting fees" of around \$17,000; rating agency fees of nearly \$29,000; service provider fees of over \$5,000; and "miscellaneous" charges of more than \$11,000.

Offsetting this is interest earned on the more than \$140 million held by Bank of New York Mellon. For the first seven months of the program, that amounted to \$113.

If the GEMS program worked as it was apparently anticipated to, the GIF paid by utility customers would be reduced by payments from residential and nonprofit users who had obtained loans from the bond funds to install solar panels on their homes and offices.

However, as of mid-June, no loans had been approved.

Withheld Studies

When DBEDT applied to the Public Utilities Commission for its approval of GEMS in June 2014, it attached several studies to the application, including four that were not made public.

Environment Hawai'i has filed requests for those reports, which are, as described in the PUC filing, a study on anticipated benefits and impacts of the program; an analysis of "Break-Even Program Repayment Cash Flows;" "GEMS Product Guidelines;" and "Perspectives of GEMS Financing Products."

Last month, DBEDT released one of the four requested studies – that of anticipated benefits and impacts – but withheld the remaining three. According to Alan Yonan, the public information officer for DBEDT's Energy Office, "there is sensitive information in [the remaining studies] that still needs to be kept confidential."

The "Perspectives of GEMS Financing Products," Yonan said, "identifies structural limitations of available financing structures in which GEMS financing may participate. If made public, such information could prevent the Hawai'i Green Infrastructure Authority (HGIA) from obtaining favorable loan terms on the state's behalf." The HGIA is the body set up by law to oversee the GEMS program.

The "GEMS Product Guidelines" report, he continued, "includes details that, if made public, could erode HGIA's negotiating with potential developers, installers, and financial service providers."

Finally, the "Break Even Program Repayment Cash Flows," he said, "contains certain portfolio assumptions that, if made public, could put HGIA at a disadvantage for program repayment."

Anticipated Impacts

As for the "Anticipated Program Benefits and Impacts," a three-page study prepared by GEMS contractor Renewable Funding, it states that by combining the net proceeds from the GEMS bond float (\$143 million) with private capital, "more than 92 gigawatt-hours of solar energy maybe produced annually," an amount representing less than 1 percent of the state's annual electricity consumption. The 7,400-plus photovoltaic projects that GEMS loans could support would reduce petroleum consumption "by over 7 million gallons, or 169,000 barrels annually," the report states.

Under the heading "Market Expansion Impact Metrics," the study says GEMS "will expand the availability of financing for underserved markets to invest in clean energy installations for over 40,000 households that currently have limited or no financing options."

"GEMS aims to enable 'the democratization of clean energy,' and the program will report on its success in expanding the eligible market, especially in the underserved markets, including such things as expansion of credit underwriting criteria, use of alternate underwriting metrics, and use of alternative repayment mechanisms."

A table that lays out the "calculation of anticipated benefits and metrics" indicates that GEMS is expected to support development of 14 megawatts (MW) of rooftop solar financed through consumer loans to 4,000 utility customers; another 9 MW will be placed onto the roofs of 2,572 customers who lease their PV systems through third-party providers; 44 MW is to be installed using "hybrid levered debt" onto 988 buildings owned or leased by nonprofit organizations that have entered into power purchase agreements with third party providers.

These 7,500 installations, the study says, account for all \$143 million of the GEMS bond proceeds.

Estimated savings per year on the utility bills of these customers is \$9,866,894 million. — P.T.



PHOTO: WIKIPEDIA

Wespac from page 1

(SIDS) for most purposes. As such, they are not subject to bigeye tuna catch limits by the WCPFC.”

Under this premise, which plaintiffs in the federal court case dispute, NMFS last year adopted bigeye tuna catch limits of 2,000 mt for each territory, of which 1,000 mt could be transferred annually to the U.S. longline fleet under private agreements between the territories and the vessel owners. This arrangement, formalized under Amendment 7 to the Pelagic Fisheries Ecosystem Plan (FEP) for the Western Pacific region, has allowed Hawai'i longliners to catch more than 4,000 mt a year, well exceeding the WCPFC quotas.

But this year, the Hawai'i longline fleet has been catching bigeye tuna at a “banner pace,” as NMFS Pacific Islands Regional Office director Mike Tosatto said at Wespac's meeting last month. And the agency's fisheries scientists predict that unless NMFS finalizes a rule authorizing the 1,000 mt transfer for 2015 soon, the U.S. longline fishery in the Western Pacific will likely be shut down at the end of August, months earlier than it's ever been closed in the past. (Each year, NMFS must specify the amount of the territorial quota that can be used by the U.S. longline fleet.)

The U.S. Pacific purse-seine fleet has already reached both its international and federal fishing-day limits and was forced to close early last month.

With one U.S. fleet closed and another poised to follow suit, Wespac voted to recommend that the United States develop a national Western and Central Pacific Ocean bigeye tuna catch limit that would apply to the U.S. purse-seine and longline fisheries and consider including in this the catch limits for the U.S. territories.

“This could achieve greater flexibility in managing the impact of the U.S. fishermen on bigeye tuna while meeting the WCPFC's conservation objective,” a council press release stated.

Whether it would be feasible, or even legal, remains to be seen.

Legal Challenges

Whether or not NMFS can allow the Hawai'i longliners to assign part of their bigeye catch to territorial quotas hinges on the outcome of the U.S. District Court complaint filed last November by Earthjustice on behalf of the Conservation Council for Hawai'i, the Center for Biological Diversity, and the Turtle Island Restoration Network.

The conservation groups argue that Amendment 7 “dodges quotas intended to prevent overfishing by creating a separate quota for ‘U.S. Pacific Territories’ and then allowing that quota to be transferred to Hawai'i-based fishermen who neither fish in territorial waters nor land their catch in the territories,” a 2014 Earthjustice press release states.

Earthjustice attorney David Henkin was quoted as saying that the United States should set an example for responsible fishing and not make a mockery of the international protections for bigeye tuna that it agreed to in 2013.

Among other things, the complaint argues that under the WCPFC's tuna conservation measure, any fish caught by the U.S. longline vessels and attributed to the U.S. territories should count toward the U.S. quota.

The groups have until July 20 to file a motion for a summary judgment finding that Amendment 7 is arbitrary, capricious, an abuse of discretion, or otherwise illegal. NMFS and the Hawai'i Longline Association, which has intervened in the case,

have until August 20 to file memoranda in opposition. A hearing on the motion for summary judgment has been scheduled for September 25.

U.S. District Judge Leslie Kobayashi ruled last month that NMFS and the HLA cannot file their own motions for summary judgment until ten days after she issues a ruling on the motion from Earthjustice.

“We can expect a decision on Amendment 7 litigation in early fall,” NOAA general counsel Fred Tucher told the council at its June meeting.

Wespac executive director Kitty Simonds asked whether any delay in the lawsuit would affect efforts by NMFS to specify the 2015 catch limits for the U.S. Pacific Island territories. At its March meeting, the council had recommended setting the 2015 and 2016 territorial limits at 2,000 metric tons, with 1,000 available to be assigned to U.S. longline fleet.

“Currently, the plaintiffs have not challenged your 2015 specification because there is no final agency action. They have to wait for a final rule to file a complaint,” Tucher replied. “We would probably oppose any effort to bring the council action into the litigation until a final agency decision on the specification,” he said.

NMFS had expected to finalize by June the rule setting the U.S. longline quota for 2015 at 3,554 metric tons, an action required to conform to WCPFC requirements. And only after this would the agency be proposing a rule allowing the Hawai'i longline fleet to assign up to 1,000 mt of its catch to one of the three territories.

NMFS's Tosatto said his office would be processing that rule over the summer “as expeditiously as we can so it's in place when we are estimated to meet the [WCPFC] quota.”

Exploring Options

Whether NMFS will be able to achieve that by summer, if at all, seemed to be in question at Wespac's Scientific and Statistical Committee (SSC) meeting held a week before the council meeting.

At that meeting, lead council scientist Paul Dalzell reported on a workshop held in April on the possibility of implementing a catch-share program for bigeye tuna. In such a scheme, permitted Hawai'i vessels with a history of catches would divide up the available quota into shares, which could then be sold to one another.

The council discussed this same idea five or six years ago, but fishermen ultimately weren't interested. With the increasing likelihood that catch limits could soon close

Acronyms, Abbreviations in Our Fisheries Articles

CNMI: Commonwealth of the Northern Mariana Islands

DPS: Distinct Population Segments

FWS: U.S. Fish and Wildlife Service

HLA: The Hawai'i Longline Association

NOAA: National Oceanic and Atmospheric Administration

NMFS: National Marine Fisheries Service

NPTZ: North Pacific Transition Zone

NWHI: Northwestern Hawaiian Islands

PIFSC: Pacific Islands Fisheries Science Center

PIRO: NMFS's Pacific Islands Regional Office

SSC: Scientific and Statistical Committee (advisory to Wespac)

TAC: Total Allowable Catch

WCPFC: Western and Central Pacific Fisheries Commission (an international regional fishery management organization)

Wespac: Western Pacific Fishery Management Council (a federal agency)

the fishery in the Western Pacific, Wespac staff broached the subject again.

The Western Pacific region has seen the longline fleet increase in size after years of fluctuating between 120 and 130 boats. This year, about 140 longline vessels are active, Dalzell said. And that increase has resulted in fish being caught at a record pace.

SSC member David Itano observed that this year is the first time he could remember the Honolulu fish auction having regular daily sales of over 100,000 pounds.

"It's really concerning. Back when we had 120-130 boats a year, it was fine. Now it's 140. We have the potential for [more than] 160. It's gonna be a real mess," he said.

Even so, the fishers at the April meeting were reportedly still reticent to endorse a catch-share program. Dalzell admitted, "Once you've gone down the catch-share path, you can't go back. It's kind of a lifetime commitment [and] some boats are going to get knocked out of the fishery." He added that catch-share programs can also pose a barrier to new recruits to the fishery.

However, SSC member Paul Callaghan blamed the lackluster response on the cushion that Amendment 7 provides.

"Fishermen feel they don't need a catch-share program because now they can allocate overage to Guam or CNMI, [but] once the fishery starts closing three months ahead of time, that'll wake them up," he said.

"We need to show them when their season would have ended without Amendment 7. This situation is tenuous and might end at any moment," he added.

Jared Makaiau of NMFS's Sustainable Fisheries Division reported that his agency was still reviewing Wespac's recommendation on the territorial catch limit and analyzing it to "bring it into compliance with applicable laws." Once that's done, his office would send it to NOAA for further review.

"So Jarad, will it make it or not?" Simonds asked.

Makaiau responded that he did not know because under some of the stock assessment model runs that have been done, overfishing will occur.

"National Standard 1 is difficult to overcome," he said, referring to a section of the Magnuson-Stevens Act that requires conservation and management measures adopted by NMFS to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."

If NMFS were to approve the territorial transfer of 1,000 mt, "while it's a negligible increase in fishing mortality, it's still going

in the wrong direction," he said.

Simonds pointed out that, region-wide, it's the purse-seine fishery and not the longline fishery that is increasing its catch. Makaiau responded that, even so, "the stock status is subject to overfishing and is overfished."

Council staffer Eric Kingma noted that the bigeye stock is only overfished under WCPFC's reference point, but under the council's pelagics management plan, it's not. He also stressed the small percentage of catch caught by the Hawai'i longline fleet in the region.

"Even without a Hawai'i fishery ... bigeye overfishing continues. That is something that is real, and we're having a real minor impact on the stock," he said.

"We'll make the best case we can with the information and the decision makers will tell us the answer," Makaiau said.

At the full council meeting, a clearly frustrated Simonds suggested that "maybe the science is all wrong."

"This 'overfishing' has been going on for 20 years. So why are we calling it overfishing?" she asked.

Sean Martin, co-owner of Pacific Ocean Producers, later urged the agency to initiate "different management measures" to keep the Hawai'i fleet fishing.

"We don't even know if we'll be fishing in the [Western and Central Pacific Ocean] in August or September. You can imagine the kind of uncertainty that gives to the industry [and] to the visitor industry," he said, referring to how much local restaurants and hotels rely on a steady supply of fresh bigeye.

Council member Mike Goto, who runs the Honolulu fish auction, expanded on the potential impacts to the fishing and associated industries if the Hawai'i longline fleet were to have to stop fishing once it hits its quota.

"They will have to return at once to Honolulu to offload before heading out to fish in the Eastern Pacific, where overfishing of bigeye is not occurring.

"This potential market flood is scary," he said. Having the fleet's catch go to the market all at once is "not optimal for everybody," he continued. "It will create a huge backlog."

Purse-Seine Plea

The bigeye longline fishery isn't the only U.S. fishery operating at record pace this year. On June 15, NMFS closed the U.S. purse seine fishery in the Western Pacific because the fleet of nearly 30 vessels had reached its high seas/U.S. Exclusive Eco-

nomie Zone limit of fishing days and had also used up the 300 days it had to fish in the territorial waters of Kiribati.

In the past, the U.S. fleet's annual allotment was about 4,000 vessel days of fishing in Kiribati, where it would catch more than half of its total haul for the year. But late last year, the country decided to slash that number down to 300, freeing up the remaining days for purchase at a higher price by other foreign purse-seine vessels.

So in May, with closure of the U.S. purse-seine fishery imminent, Tri Marine International (which just opened a new tuna cannery in American Samoa earlier this year) petitioned NMFS to adopt a rule that would exempt U.S.-flagged purse seine vessels from the WCPFC high seas limit, so long as those vessels agree to deliver at least half of their catch to American Samoa canneries.

Purse-seine vessels fishing out of American Samoa want to fish in American Samoa and the canneries want to keep them close, as well, Tri Marine chief operating officer Joe Hamby told the council at last month's meeting. He said he was worried the vessels will go to countries such as the Federated States of Micronesia or Papua New Guinea, where they can still fish under the South Pacific Tuna Treaty. If they do that, "they won't want to come back to American Samoa to unload," he said.

A rule similar to Amendment 7 that would treat American Samoa as a quota-free SID would allow U.S. vessels to keep fishing in and around the territory and keep his company's new cannery afloat, as well, he argued.

Earlier in the council meeting, member William Sword of American Samoa noted that 68 percent of the territory's economy relies on the tuna canneries. And without a purse-seine fleet, "we have no cannery," he said.

"Kiribati pulled the rug out from under us," he continued, adding that his government was desperately seeking ways to negotiate more fishing opportunities with both the U.S. government and international fishing bodies.

Council member McGrew Rice of Hawai'i suggested that longliners in American Samoa could ramp up their efforts to fill the gap, but Sword shot that idea down. "That's not gonna do it," since the canneries need 450 tons of fish a day, he said.

In the end, the council supported Tri Marine's effort to open up U.S. purse-seine fishing around American Samoa and went so far as to recommend the establishment of a combined purse-seine and longline

national bigeye tuna quota for the Western Pacific, one that would include each of the 2,000 mt allocations set for the three territories. The council also recommended that NMFS consider developing regulations that allow fishing effort and catch from Pago Pago-based U.S. purse-seine vessels to be attributed to American Samoa. The latter recommendation would be contingent upon the vessels not landing any more bigeye.

Whether or how such a thing would comply with the current WCPFC tuna conservation and management measure or with federal law is unclear. Tosatto, who abstained from voting on both items, says that because NMFS hasn't yet answered Tri Marine's petition, he can't comment on how the WCPFC would react.

"I can say that NMFS would only propose regulations that the agency deems to be legally sufficient in complying with all applicable U.S. laws, treaties and obligations," he states in an email to *Environment Hawai'i*.

Comments by council staffer Kingma during the SSC meeting suggest that, at the very least, implementing a bigeye tuna quota for purse-seiners would be a real practical challenge. The main problem, he said, would be with accurately estimating the amount of bigeye caught by purse-seine nets.

Purse-seiners generally target skipjack and albacore tuna, but juvenile bigeye are often taken as bycatch when setting on fish aggregating devices. Training someone to identify and estimate the number of bigeye in a mixed haul of 100 mt of fish would be difficult, Kingma said.

He added that negotiating and allocating a bigeye tuna quota for all purse-seiners in the Western Pacific would likely be contentious and highly political.



Primary Productivity in Transition Zone Has Dropped Over the Last Decade or So

The nutrient-rich band of ocean above the Hawaiian islands known as the North Pacific Transition Zone (NPTZ) has become less so by about 20 percent over the past several years. That's according to new research by the Pacific Islands Fisheries Science Center (PIFSC), a research arm of the National Marine Fisheries Service.

Whether the decline is a sign of climate change or merely an instance of decadal

oscillation, the drop in concentrations of marine chlorophyll just north of the island chain is "not a good trend" for the swordfish fishery, PIFSC Fisheries Research and Monitoring Division chief Christopher Boggs said at last month's Western Pacific Fishery Management Council meeting in Honolulu.

The Hawai'i-based swordfish fishery often targets the transition zone because of its high productivity. The North Pacific population of loggerhead turtles, federally listed as endangered, also forages and travels along the band, as does "a diverse assemblage of tunas, billfishes, seabirds, sea turtles, and marine mammals," a PIFSC summary report states.

But after years of monitoring, the center's scientists have found that chlorophyll concentrations have noticeably declined within the 8,000-kilometer long NPTZ, where cool waters from the high-chlorophyll subarctic gyre converge with warmer waters from the low-chlorophyll subtropical gyre surrounding Hawai'i. (Chlorophyll concentration is an index of primary biological productivity, the summary states.)

Climate change modeling led by the center's Ecosystems and Oceanography Division chief Jeffrey Polovina had previously projected that the NPTZ would become more subtropical — and more nutrient-poor — over the next several decades. Indeed, between 1998 and 2014, the NPTZ experienced an 18 percent decline in its median annual surface chlorophyll, although the decline did not occur over the entire time period, the report states.

"Rather, during the period of about 1998-2007 there is interannual variation but no trend, while during about 2008-2014 there is a significant declining trend," it states.

The difference in chlorophyll may be due to a slowdown in the flow of water from the subarctic gyre, Boggs said. PIFSC's research has shown that southward flows during the winters and springs of 2008 to 2014 were weaker than those recorded between 1998 and 2007.

Chlorophyll levels in the transition zone fluctuate seasonally, growing higher in the spring and winter and dropping in summer and fall. The long-term decline is mostly affecting chlorophyll levels in the spring and winter, "when the swordfish fishery is big," Boggs said.

Not only have chlorophyll levels dropped by as much as 25 percent, maximum levels have dropped and are occurring two weeks later, all of which suggest that the zone is becoming more like subtropical waters, the report states.

"That system is becoming less productive," Boggs said.

"Whether this represents a more permanent manifestation of climate change or simply a decadal variation will not be apparent for another decade or two but given the likelihood of higher trophic level responses to changes in chlorophyll concentration the situation warrants continued monitoring. Higher trophic level responses have yet to be documented," the summary states.

Polovina says he does want to look at impacts of these changes on species higher up the food chain — at higher trophic levels — such as tuna and turtles, but adds that finding a good data source is challenging.

"The swordfish fishery is a possibility but the effort in that fishery has been moving eastward so generating a time series in the same area might be difficult," he stated in an email to *Environment Hawai'i*.

According to NMFS's 2014 longline logbook summary report, the Hawai'i fleet's swordfish catches were up in 2014, but have "been on a downward trend since 2007." About 20 U.S. longline vessels landed swordfish in Hawai'i last year.



NMFS Extends Comment Period On Green Turtle Listing Proposal

Last month, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service announced that they have extended to July 27 the comment period for their proposed rule to establish 11 distinct population segments (DPS) for the green turtle, *Chelonia mydas*, maintaining the Hawai'i population as threatened, and uplisting to endangered the populations that live in and around American Samoa, Guam and the Commonwealth of the Northern Mariana Islands (CNMI).



Green Sea Turtle

The previous deadline was June 22.

The extension was, in part, to allow public hearings to be held in American Samoa, Guam, and CNMI, which fall within the proposed Central West Pacific and Central South Pacific DPSs. Hawai'i's green turtle population would be included in the proposed Central North Pacific DPS.

If comments last month from Wespac's American Samoa and Commonwealth of the Northern Mariana Islands representatives are any indication, NMFS and FWS are likely to face heated crowds at the hearings this month.

Council members from Hawai'i, as well as council staff, also lambasted NMFS for refusing to delist the Hawai'i population, which, they argue, will survive any climate change impacts and are already exceeding the carrying capacity of foraging areas.

Richard Seman, council member from the CNMI, said his people have tried for years to get approval from the federal government to kill four turtles a year to "teach kids to respect the turtle." He argued that allowing cultural take would open the door to more education about and, ultimately, the conservation of the green turtle.

If the turtle population around Guam and CNMI is uplisted, "I don't know what the federal government is going to try to do to let us do it our way," he said.

Patrick Opay, head of NMFS's endangered species section, said it would be a hard sell for NMFS and FWS to allow take when they're trying to tell people not to take the turtles.

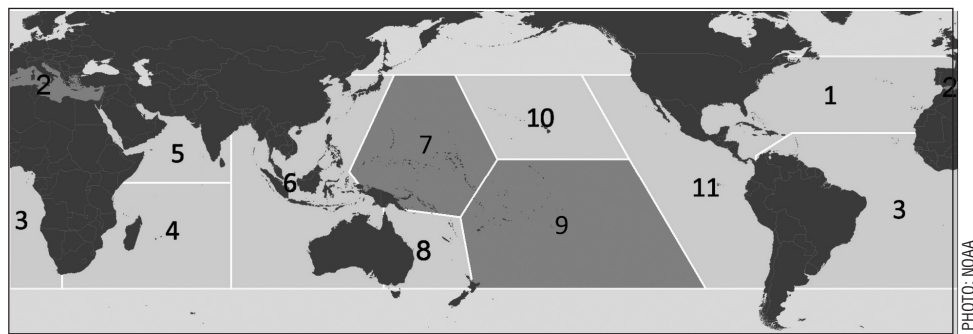
"They are in trouble because of over harvesting," he said.

But John Gourley, a council member from CNMI, countered that it was the federal government's "don't touch" approach to management that's failed the turtles.

"That type of attitude alienates the very kind of people you have to have support your program," he said, adding that had NMFS and FWS even attempted to allow cultural take, it would have gone a long way.

He warned that the people of CNMI already have ill feelings about the management of endangered species, noting that some people on the island of Rota, home to the critically endangered crow *Corvus kubaryi*, are shooting the birds because they're seen as restricting agriculture.

Domingo Ochavillo, a council member from American Samoa who heads the territory's Department of Marine and Wildlife Resources, added that NMFS and FWS probably didn't even conduct a population viability analysis for the



Threatened (light gray) and endangered (dark gray) green turtle distinct population segments (DPSs): 1. North Atlantic, 2. Mediterranean, 3. South Atlantic, 4. Southwest Indian, 5. North Indian, 6. East Indian-West Pacific, 7. Central West Pacific, 8. Southwest Pacific, 9. Central South Pacific, 10. Central North Pacific, and 11. East Pacific.

turtles in his region. He also said he didn't think any management measures imposed by the federal government for the Central South Pacific would be applied across the DPS, which includes a number of foreign countries.

Council staffer Asuka Ishizaki argued that the proposed rule failed to quantify threats from climate change and sea level rise, which NMFS and FWS characterized as two of the main threats to the Central North Pacific DPS.

She noted that the agencies failed to supply any evidence that the loss decades ago of Whaleskate Island — a former popular nesting site at French Frigate Shoals in the Northwestern Hawaiian islands — or the presence of the fibropapilloma disease have kept the Hawai'i population from growing.

What's more, NMFS failed to fully reference a "significant publication" from 2010 suggesting that East Island at French Frigate Shoals will still retain about 70 percent of its existing sand area despite projected sea level rise, she argued.

That paper, by NOAA scientists Manjula Tiwari, George Balazs, and Stacy Hargrove, concluded that East Island, which already hosts about half of all of the Hawai'i population's 3,000-plus nesting females, could support as many 30,000 of them. However, it continued that the turtle population at FFS "may be regulated by availability of food and forage in suitable habitats."

Ishizaki also referenced another 2010 paper indicating that the some turtle foraging areas in West Hawai'i are near carrying capacity.

Climate change and sea level rise arguments for the Hawai'i population are based on two assumptions not supported by the best available science, she said. The first is that French Frigate Shoals will disappear due to sea level rise; the second is that the turtles that nest there won't relocate and

will cease to reproduce, she said.

"Green turtles have the resiliency to adapt to changes in nesting habitat and alternative nesting habitat is available throughout the archipelago," she said.

With regard to the proposals to uplist the populations around American Samoa, Guam, and the Marianas, Ishizaki complained that NMFS's positions were based on old and insufficient data. Unlike Hawai'i, research in those regions covered only a small percentage of the thousands of atolls there, she said.

In addition to maintaining the listing status for Central West Pacific and Central South Pacific DPSs as threatened, Ishizaki said the council wants NMFS to reconsider the threatened listing for the Central North Pacific DPS. The agencies should also exempt cultural take of the turtles from the take prohibitions under the Endangered Species Act, and refrain from designating critical habitat, she added.

"Such designations are not likely to provide any measurable benefit to green turtle populations," she said.

In response to the council's comments, Opay tried to explain that although there are green sea turtle populations across the globe, the 2013 petition submitted by the Association of Hawaiian Civic Clubs to delist the population around Hawai'i also sought to separate it as a distinct population segment (DPS). That NMFS is now looking at dividing the global population into 11 separate DPSs "affects some of the decision making. ... It's almost like each DPS is its own species," he said.

In an interview with *Environment Hawai'i*, Opay also stressed that, by itself, the concentration of the Hawai'i population's nesting females at French Frigate Shoals played a significant part in the decision to maintain the DPS as threatened.

— Teresa Dawson

Bringing Water to Land ADC Acquired Near Whitmore Could Top \$11 Million

Plans to make the Whitmore area in North O'ahu the island's agricultural hub — complete with processing facilities, an agribusiness-technology park, and thousands of acres of farmland — are quickly coming together, at least when it comes to acquiring land. But developing the system of wells, reservoirs, pipes and ditches necessary to provide sufficient water to irrigate those lands is going to take some time and, according to a state consultant, could cost around \$11 million.

Since 2012, when the state acquired 1,700 acres of farmland in North O'ahu from the former Galbraith Estate for \$25 million, more than \$14 million more has been spent buying up the surrounding lands that are part of the Whitmore Project, the brainchild of state Senator Donovan Dela Cruz who represents the area.

The project has been adopted and is being implemented by the state Agribusiness Development Corporation. To date, the agency has acquired the Tamura warehouse for \$4.2 million; 24 acres from Castle & Cooke Co. for \$3.6 million; and 257 acres from Dole Food, Inc., for \$5.6 million.

This year, the Legislature and Governor David Ige approved the expenditure of \$10 million for the purchase of even more farmland in the area owned by Dole Foods and Castle & Cooke.

So far, only Larry Jefts' Kelena Farms, Inc., has put any crops in the ground — it planted 75 acres of watermelons in April. Ohana Best Farms and Ho Farm, the ADC's two other tenants on the former Galbraith lands are still preparing their lease areas, clearing vegetation and amending the soil.

Water has been and continues to be a limiting factor for the Galbraith lands and even some of the lands more recently acquired by the ADC. A single well, capable of producing 2 million gallons of water a day (mgd), serves the entire 1,200 acres for former Galbraith land under ADC control (the Office of Hawaiian Affairs owns the remaining 500 acres).

Jefts has said that the well can serve, at best, 600 acres, an estimate that comes close to one made recently by Kennedy/Jenks Consultants, which had been hired to investigate the irrigation possibilities for the Wahiawa/North Shore area. In a report to the ADC on April 22, Kyle Okino

of Kennedy/Jenks said the Galbraith lands would require 3,000 gallons of water per acre. Should the ADC end up leasing up to 1,700 acres of Galbraith and possibly some of Dole's lands, it would need 5.1 mgd.

The company came up with four alternatives: 1) draw all 5.1 mgd from nearby Lake Wilson; 2) use 1.5 mgd of reclaimed water from the Wahiawa wastewater treatment plant (which discharges into the lake) and draw 3.6 mgd from the lake; 3) draw 5.1 mgd from the Wahiawa Irrigation System (WIS), which includes effluent from the Wahiawa treatment plant; and 4) take 2.1 mgd from the WIS and 3 mgd from the lake.

The cheapest option would be Alternative 1, which Okino said would cost about \$7 million, but ADC board member Roy Hardy, acting director of the state Commission on Water Resource Management, noted that diverting water from a natural source such as a lake would require a diversion permit from the commission.

The most expensive would be Alternative 2, which would cost \$11 million, Okino said.

In addition to facing the cost of diverting water to the Galbraith lands, the ADC, Kelena, and Ohana Best are working toward developing four reservoirs that would cost a total of about \$6 million.

In May, the ADC published a draft environmental assessment (DEA) for the project, which would include the ADC's construction of a 10 million gallon reservoir and a three million gallon reservoir. Kelena Farms and Ohana Best Farm would build reservoirs of 3.1 million gallons each within their lease areas. Ohana Best is also proposing to drill a second well to serve its 160 acres.

ADC's reservoirs are expected to cost just under \$5 million to construct, while the two privately built ones will only cost around half a million each, the DEA states.

— T.D.

For Further Reading



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- "ADC Gives Ho'opili Farmers First Shot at Large Chunk of Former Galbraith Land," January 2013;
- "ADC Supports Intent to Buy Whitmore Village Lands," February 2013;
- "Former ADC Board member Wins First Galbraith License," June 2013;
- "Water May Be Limiting Factor on Former Galbraith Ag Lands, December 2013.



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Mediation Over West Kaua'i Stream Diversions May Hinge on Response to Information Request

Last month, the Kekaha Agriculture Association (KAA) and the state Agribusiness Development Corporation (ADC) informed the state Commission on Water Resource Management that they were willing to participate in mediation regarding a 2013 waste complaint and a petition to amend the interim instream flow standards for the streams that feed Kaua'i's Waimea River.

In a June 5 letter to the Water Commission, attorney Douglas Codiga, representing KAA, also agreed to allow the commission's investigator, Steve Spengler of Element Environmental, LLC, to monitor flows within the Kekaha and Koke'e ditches and evaporation losses from reservoirs on the Mana Plain. The organization, which maintains and operates the ditch systems for the ADC, its landlord, also agreed to assist Spengler with his measurements.

In response to the complaint and petition, filed by Po'ai Wai Ola and the West Kaua'i Watershed Alliance, the commission hired Spengler to assess how and where the Koke'e and Kekaha systems were diverting the Waimea River's headwaters. Spengler's initial findings, released earlier this year, suggest that some of the 50 million gallons of water a day diverted via the two former sugarcane plantation systems was being wasted.

To better understand how KAA members and the ADC are using the water, and whether those uses are reasonable and beneficial, commission chair Suzanne Case wrote them on May 11, asking for information regarding 15 areas where her agency needs more information. Among other things, she asked for details on who uses or has used the water, how much they use or used, what for, and how and where the diverted water is moved around.

She asked that they respond within 60 days and to indicate within 30 days whether

they would be open to mediation.

Dean Uyeno of the Water Commission's Stream Protection and Management Branch has been coordinating mediation efforts and says that the state Department of Hawaiian Home Lands, which owns land served by the irrigation system and the Kaua'i Island Utility Cooperative are also willing to participate in mediation. Kaua'i County has asked to reserve its right to participate in the mediation, as well.

Uyeno says Earthjustice, the law firm representing the petitioners, is also willing, "but their participation is subject to the data that KAA/ADC submits."

"Until we're on equal footing and have bonafide disclosure, we question the efficacy of mediation," Earthjustice attorney Isaac Moriwake said at the Water Commission's meeting last month.

He added that based on his experience working to restore stream flows in the Na Wai Eha case on Maui, he thought staff and the commissioners should be prepared for "the possibility that this information gathering may go on beyond this initial letter."

He then reminded the commission that the petition has been pending for almost two years, adding that any further delay favors the diverters because it maintains the status quo.

"The lack of information benefits their diversions in the same way," he said.

Commissioner Denise Antolini agreed that the commission can't wait forever to get all of the information it wants.

"Because of public trust responsibilities and the precautionary principle ... there's a point at which the commission needs to act to protect the resource even without the data," she said.

She suggested that should the ADC/KAA fail to respond in a timely or sufficient manner, the commission could issue an

order to show cause why remedial action on the water waste shouldn't be taken immediately. Under such an order, ADC/KAA would have the burden of proving why they should be allowed to maintain the status quo.

"It's an extremely useful tool short of the commission making a decision on the merits," she said.

Moriwake added that commission staff could on its own draft an order that the ADC and KAA stop specific acts of water waste.

"There's low hanging fruit here," he said. "One example, the fake waterfall issue. Why do we drain headwater streams dry and dump that water?"

Moriwake was referring to Spengler's finding that the Koke'e Ditch dumps water from four streams into Koke'e Stream, creating a consistent waterfall. Under undiverted conditions, it would be dry.

Moriwake and Case agreed that such matters could be dealt with in mediation.

At its August meeting, the Water Commission is expected to be briefed on the ADC/KAA response. Depending on what's submitted, commission staff may recommend an order to show cause.

In the meantime, the future of water use at Kekaha is in flux. While the petitioners are calling for the restoration of streams that have long been dewatered or severely restricted, one of ADC's largest tenants in Kekaha, seed-corn grower Syngenta, months ago forfeited hundreds of acres it leased from the agency. But so far, there has been no talk of returning the water used on those fields to streams.

At an April meeting of ADC's board of directors, state Department of Agriculture director Scott Enright said the agency should try to find a farmer who wants to plant food crops on the former Syngenta lands.

Meanwhile, the ADC recently amended a right-of-entry permit granted to KIUC in February 2014 to conduct field investigations for a 20 megawatt pumped storage hydropower project the utility wants to build using the irrigation system. — **T.D.**