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A Pyrrhic Victory For HECO?

It isn't hard to imagine that the halls of Hawaiian Electric's Honolulu headquarters resounded with the sounds of champagne corks popping on the afternoon of October 12, the day when the Public Utilities Commission killed the Net Energy Metering program.

HECO had tried to slay the program on its own by forcing would-be solar panel owners and installers to jump a series of ever higher screening hurdles over the last couple of years. Now, though, it's official: NEM is dead. Long live – the self-supply option? The grid-supply option?

No catchy acronym has been crafted yet for the new regime, but as our cover story suggests, there's a better-than-nil chance that the PUC decision has laid the foundation for a new structure that actually exacerbates the social inequities that can accompany distributed energy generation and pushes the burden of grid support onto a diminishing customer base.

IN THIS ISSUE

Will PUC Decision to End Net Metering Drive HECO Customers From the Grid?

A year and two months after the Hawai'i Public Utilities Commission opened a docket to determine the future of net energy metering, or NEM, it has concluded the first phase in a two-step process. On its face, the result would seem to be a blow for the companies that install rooftop photovoltaic systems and the customers who were hoping to take advantage of the program.

Under NEM, customers receive a credit for each kilowatt-hour supplied to the grid that is equal to the amount they are billed – an amount that the PUC calls the retail rate. The PUC decision grandfathers existing NEM customers as well as those who had applied to participate by the time the decision took effect.

From now on, however, homeowners who install rooftop PV systems will not be able to get that same dollar-for-dollar credit for energy they generate. Instead, customers for each of the Hawaiian Electric utilities — Hawaiian Electric on O'ahu, Maui Electric, and Hawai'i Electric Light Company on the Big Island — will receive credit for energy generated equal to roughly half of what the going kWh rate is on their respective islands.

After the decision was announced, commentary generally viewed it as a win for the utility – which had argued that NEM customers were not paying their fair share of grid upkeep, forcing other, less well-off ratepayers to pick up the slack. That slack, HECO claimed, amounted to several tens of millions of dollars a year.

Those economic inequities were cited by Hawaiian Electric, the Division of Consumer Advocacy, and others in push-

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NEW AND NOTEWORTHY

Gardens Gone? The iconic gardens at Honolulu International Airport international terminal may soon be no more than a memory. The three gardens and their ponds – landscaped in the styles of China, Japan, and Hawai'i – have long been a sanctuary for weary travelers seeking relief from the commercial bustle of the terminal's concourses.

But recently, construction on both the concourse and garden levels suggests this bit of nature may not last much longer. On the concourses leading from the main terminal to the gates, high plywood screens shielded the gardens from the view of travelers. On the garden level itself, in front of the area that used to house the American Airlines lounge, workers were erecting framing that, according to one worker, would be part of a future commercial area.

Koi in a pond in the airport gardens.

Elsewhere in the garden area, benches suffer from neglect: slats between concrete standards appear to have been painted most recently in the last century, while the benches themselves wobble on a crumbling foundation. The once-manicured gardens are unkempt and overgrown. Sidewalks are unswept and untidy. The view through dirty glass into the darkened rooms that used to house swank airline clubs reveals furniture and lamps shoved against the walls.

Emails to the airports administrator of the state Department of Transportation, asking for information about the construction work, had not been answered or even acknowledged by press time.

Quote of the Month

"A public-private partnership is a very difficult phrase to actually put into practice."

— Doug Chin, state Attorney General

FIT Program Shapes Up: If the Hawaiian Electric companies' net metering program for solar photovoltaic systems has been too successful, its feed-in tariff (FIT) program — which covers solar PV, wind, and concentrated solar power — has been the opposite. According to a September status report submitted to the state Public Utilities Commission, only a little over 20 megawatts of renewable energy has been installed under the FIT program, which launched five years ago. That's only a quarter of the total number of MW allowed under the program.

It was hoped that the program's terms guaranteeing grid access and set rates for power for 20 years would spur rapid development of renewable energy projects. But the program suffered early on as developers grappled with expensive interconnection studies imposed by the utilities, as well as with lackadaisical, speculative or unprepared applicants who clogged up the program's active and reserve queues.

In 2013, the PUC issued an order that resulted in dozens of projects being purged. Then late last year, the PUC issued another order aimed at further cleaning up the queues, which by December had grown to include nearly 180 applicants. The commission eliminated the reserve queue, which had 64 applicants, and set deadlines by which applicants in the active queue must prove their projects are "shovel-ready," among other things.

Some parties to the FIT docket, including Blue Planet Foundation and the state Department of Business, Economic Development, and Tourism, opposed the elimination of the reserve queue, arguing that the move would discourage renewable energy development. But since the PUC's order, the completion of FIT projects has actually ramped up a bit. Nearly a third of the total MW installed under the program occurred since December. At this rate, it would be another five years before the program's cap of 80 MW statewide is reached.

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BOOK REVIEW

The Bittersweet Legacy of Sugar

Carol A. MacLennan. ***Sovereign Sugar: Industry and Environment in Hawai'i.*** University of Hawai'i Press, 2014. 392 pages . $39.00 (cloth).

In 1939, Harper & Brothers Publishers released John W. Vandercook's history of sugar in Hawai'i. *King Cane,* it was called, and Vandercook was nothing if not enthusiastic in his regard for the benevolence of the planters, the benefits for the workers, and the boon for the territorial economy that the sugar plantations represented.

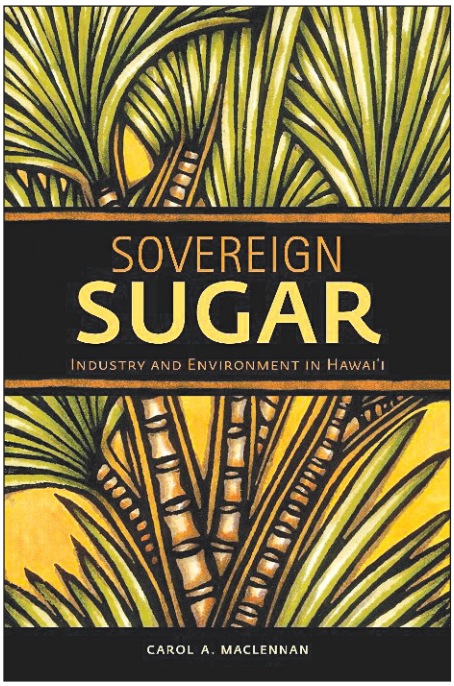
In *Sovereign Sugar,* Carol A. MacLennan, an anthropologist at Michigan Technological University, makes no reference to Vandercook, despite the uncannily similar and alliterative titles of their respective works.

But the titles are the only similarity that Vandercook's and MacLennan's books share. While Vandercook surveyed sugar at its peak, MacLennan examines its impact at a time when it is at its nadir. The only working plantation today — Alexander & Baldwin's Maui plantation, Hawai'i Commercial & Sugar — is holding on to its land and water for the time being, but challenges over its ongoing diversion of East Maui streams and renewed, reinvigorated concerns over its cane burns cast a shadow over its future viability.

In reviewing the evolution of Hawai'i's economy from the time of first Western contact up to the present day, MacLennan identifies a number of critical turning points that led to the unique characteristics of Hawaiian sugar, as opposed to plantation economies in other islands such as Java, Cuba, and the Philippines.

One of these decisive factors was the involvement of missionaries in the shaping of the laws and policies of the Hawaiian kingdom. "Modern ecological change in Hawai'i begins with money and law," MacLennan writes at the start of the third chapter, "Four Families," which lays out the ways in which missionaries sent to the islands by the American Board of Commissioners for Foreign Missions in Boston helped lay the foundation on which the sugar economy was erected in the second half of the nineteenth century.

"Imperceptibly linked with the Christian agenda was the idea of the natural right to property," MacLennan writes. "A simple concept, but contrary to Hawaiian culture, it was a product of Europe's enlightenment



and, colored by the American experience, influenced the developing institutions of a sovereign Hawaiian state." She notes other factors as well, including trade with Pacific powers and the growing presence of British, French, and American business interests. None of these, however, seem to match the influence of the missionaries when it came to shaping the minds and values of young Hawaiian elites.

MacLennan is not the first to point out the close ties between the missionaries and the evolution of Hawaiian law into a system that protected private rights and allowed the islands to be carved into private holdings. She does, however, point out some of the milestones that drove this process, including the decision of the mission board in Boston to cut off support:

"The ABCFM in Boston sent word as early as 1848 that the missionaries should begin to plan for self-support," she writes. "Realizing that missionary families frequently left their posts prematurely to educate their families in the United States, it reversed its policy forbidding personal gain from landholding and businesses. Instead, it encouraged its people to become residents and citizens and allowed them to acquire property." By 1854, when the tether was finally cut, the mission board assigned its holdings to the missionaries, with the blessing of the Hawaiian government. "Nearly everyone recognized the opportunity to buy land as crucial to their economic survival."

The ability to hold private property was necessary but, on its own, not sufficient to allow the plantation economy to develop in Hawai'i as it did.

"Hawai'i's specific path is marked by development of a corporate lock on economic and political power rather unique in the history of sugar," MacLennan writes. "Control of land, water, forest, and other natural resources through either outright ownership or political influence made Hawai'i's sugar kingdom a standout example of global sugar production and, more importantly, set the agenda for natural resource use policy for decades to come."

MacLennan describes the development of plantations from small holdings of many individuals into the larger plantations that were eventually held by the famed "Big Five" (which, she notes, were themselves largely owned by the descendants of four missionary families). The small planters' need for credit led to their dependence on agencies, or factors. "These two developments — credit dependency and corporate ownership of the sugar enterprise — proved central to the development of industrial agriculture in the 1880s," she notes, with the end result of dependency being outright ownership by the agencies. And the missionary and other New England investors, she points out, "were the first to employ the corporate ownership structure," insulating them from the pitfalls of individual ownership.

When the corporate structure was combined with the agency structure, the foundation for plantation control was complete. "Every agency claimed money from three sources of the plantation enterprise: profit from sales of regular supplies such as food, lumber, and tools; interest on any cash advanced to pay workers or buy supplies and on any debt for capital expenses; and commissions on sugars sold in California." After the 1876 Treaty of Reciprocity, allowing favorable treatment of sugar exports to the United States, indebtedness increased substantially, as planters sought to keep up with newer, more efficient technologies requiring substantial investment.

By the early 1900s, as members of the second generation of missionaries passed away, she writes, "their stocks gradually appear under the names of trusts, estates, and banks – all forms of holding companies.

… By 1920, a very large portion of the sugar assets were in the hands of the families that controlled Castle & Cooke, C. Brewer, and Alexander & Baldwin." In addition, descendants of missionaries established "most of the new companies providing essential support services to plantations and the new industrial economy," MacLennan notes.

> *"Salted salmon, delivered in barrels to the plantation store, provided the fish that Hawaiians could no longer provide on their own."*

The most significant change in the landscape wrought by sugar occurred after the reciprocity treaty. From 377 tons in 1850, to 12,540 tons in 1875, exports jumped exponentially by 1880 — to 31,792 tons, a whopping 250 percent. Before 1880, "the environmental reach of the plantation centers … was relatively small — at least physically," she writes. Once the plantations expanded, requiring the import of labor from China, fields once planted in taro were converted to rice. Taro became scarce and pa'i'ai (pounded taro) became expensive. What's more, "salted salmon, delivered in barrels to the plantation store, provided the fish that Hawaiians could no longer provide on their own. … It, too, became an expensive food staple."

Beyond the cultivated coastal lands, sugar reached into the upland areas as well. "Hawai'i's forests also showed signs of wear from sugar by 1880. Cattle and goats had already decimated the kula lands on Haleakala's slopes above Makawao on Maui and the forested regions around Waimea and the Kohala Mountains on Hawai'i island. The heavy demand for firewood to power the larger mills culled the forests of valuable wood above plantation districts where cattle had not yet encroached, extending farther the areas already denuded of forests."

As early as the 1860s, the planters began to address the barren uplands. "At Lihu'e Plantation, manager Paul Isenberg began a reforestation project on the company's lands above the cane fields during his tenure (1863-1878)… He recognized the link between water production and forests." Before the century's end, the Hawai'i Sugar Planters Association had undertaken a replanting program, which eventually partnered with the territorial government in the establishment of the first forest reserves in the islands.

The forest uplands were vital to replenishing the island aquifers, which in turn fed the increasingly complex hydraulic system of the plantations. Water was used to transfer cane from the fields to the mills as well as to irrigate crops. By the turn of the 20th century, "when government and crown lands passed into the hands of the American Government, so did the right to grant licenses for water development in island interior mountain ranges. … These projects extended sugar's environmental reach into interior forests and granted it control over the significant water resources of Kaua'i, O'ahu, Maui, and northern Hawai'i island."

> *"Once land was occupied and producing income, it was difficult for Hawaiians and their government to reverse the usage."*

In the 1930s, the territorial government and the U.S. agricultural extension service hired a University of Hawai'i geography professor, John Wesley Coulter, to map the islands and collect land-use data. MacLennan reproduces his maps, which show "the extent of the plantations' replacement of natural and human Hawaiian landscapes. Except for the lava fields and the highest alpine lands of Haleakala, Mauna Loa, and Mauna Kea, all available land had a direct economic use. Even the forests were devoted to water production for irrigation…. [A]ll available arable land was occupied by agricultural establishments, including what [Coulter] determined were marginal and submarginal lands under sugar cultivation."

MacLennan describes the "evolution of natural resource policies," arguing that it may be divided into two main periods. "The first covers the era of the independent Hawaiian nation from the 1840s until its overthrow in 1893. The second period coincides with the American capture of state power during the Republic and territorial eras. … Over the course of these two periods, the role of Hawai'i's resource policies evolved from one of serving agricultural development and nationhood into one of protecting the profitability of sugar plantations and the spin-off of the pineapple industry."

This entailed what she calls "the gradual transformation of public resources into private goods." At the time of the Mahele, land was divided into three categories: private, public (government), and crown lands. "Within fifty years, these distinctions virtually disappeared into legal fiction, and public resources primarily served the exclusive interests of the plantation economy."

"Once land was occupied and producing income, it was difficult for Hawaiians and their government to reverse the usage," she notes.

Even in the post-sugar era, the footprint of the plantations remains. "Although gone from the landscape, the mark of sugar remains today in Hawai'i's land use and water policies and in the lives of people who worked and grew up in its sugar economy. Acting as an invisible force, sugar's ghost continues to frequent the islands with its legacy of economic dominance."

At nearly 300 pages of text, 11 appendices, more than 50 pages of notes, and an index, *Sovereign Sugar* provides a comprehensive overview of the political, economic, and social history of sugar in Hawai'i. Interleaved with this, MacLennan catalogs the heavy footprint the plantations have left on the islands' natural resources.

While the book may not be the last word on sugar's environmental impact, MacLennan is to be commended for bringing the environment into the larger context of the revolutionary social and political changes the planters wrought.

— Patricia Tummons

PHOTO: FOREST & KIM STARR

Smoke rising from a cane burn on Maui.

Future of Kalo'i Gulch Case Hinges On Limu Group Replacing 'Uncle Henry'

In the coming weeks, the state Board of Land and Natural Resources is expected to decide whether or not to allow the non-profit Kua'aina Ulu 'Auamo (KUA) to replace native Hawaiian educator and cultural practitioner Henry Chang Wo, Jr., as petitioner in the contested case over an 'Ewa Beach drainage project that would funnel more urban runoff into the marine waters where he and his kupuna used to collect limu (seaweed) and where he for decades led community efforts to maintain the beds.

When Chang Wo died from mesothelioma on September 19, he was in the midst of a decade-long fight to prevent Haseko ('Ewa), Inc., from directing drainage from its Ocean Pointe development into the waters off One'ula Beach Park. After the Land Board denied Haseko's bid several years ago for a state Conservation District Use Permit (CDUP) to lower a 500-foot-wide sand berm spanning the park by a few feet to create a larger outfall, the company tried again in 2011.

This time it was joined by the state Department of Hawaiian Home Lands, the City and County of Honolulu, and the University of Hawai'i. The parties argued that lowering the berm would meet the city's 100-year storm flow requirements for the Kalo'i Gulch watershed and, thereby, allow them to develop lands currently used or reserved for stormwater retention.

Over the objections of Chang Wo and Michael Kumukau'oha Lee, also a native Hawaiian cultural practitioner, the Land Board granted the CDUP in March 2012. Chang Wo and Lee argued that the increased runoff resulting from the project would harm the seaweed that they used for their traditional and customary native Hawaiian practices.

After a contested case hearing in 2013, the Land Board again issued the permit in June 2014. Chang Wo appealed to the 1st Circuit Court, which in December remanded the issue of whether a supplemental environmental impact statement for the project should be done. The Land Board heard oral arguments in March, but held off on issuing a decision pending a site visit, which took months to get court approval for.

In asking the court's permission in June, state deputy attorney William Wynhoff noted that since the Land Board granted the permit, the composition of the board has significantly changed. Of the board's seven members, only Maui Land Board member Jimmy Gomes signed the original decision and order.

After the March hearing on the SEIS issue, Wynhoff wrote, "Board members were concerned that they had not been to the subject area [and] felt they would be able to make a better and more informed decision if they first did a site visit."

On August 5, the court issued its order granting permission for the Land Board to conduct a site visit, which was scheduled for late September. By early September, however, Chang Wo's health had sharply declined and his attorneys at the Native Hawaiian Legal Corporation were preparing to substitute KUA as the petitioner in the contested case hearing.

In their September 17 motion to the Land Board, NHLC attorneys David Kimo Frankel and Li'ula Nakama wrote, "Because the BLNR has all the information it needs to make a decision and because it even has proposed orders from the parties, Uncle Henry urges the BLNR to promptly issue a decision once it concludes its site visit."

"Corporations may live forever, but people do not. Mortality should not extinguish the ability of Hawaiians to carry on their cultural traditions. Allowing KUA to grab the 'auamo for him is fitting. Please permit KUA to substitute for Uncle Henry," they wrote. (An 'auamo is a "pole or stick used for carrying burdens across the shoulders," according to the Hawaiian dictionary site wehewehe.org.)

Chang Wo himself stated in his September 10 affidavit that he wished to ensure that his cultural tradition could be carried on by future generations. He added that he had been working with KUA and its predecessor organization for several years "networking with other limu practitioners and passing on my knowledge and skills to a new generation of limu gatherers."

KUA executive director Kevin Chang added in his declaration that Chang Wo was a founding kupuna of KUA, which "empowers communities to improve their quality of life through caring for their biocultural (natural and cultural) heritage.

Inspired by Chang Wo, KUA has organized a network of limu practitioners "committed to sharing knowledge and perpetuating practices," Chang wrote.

The Land Board has not decided on the NHLC's motion, but instead issued a minute order on October 9 requiring the permittees to submit any opposition by October 23 and the NHLC to provide its response by October 30.

According to DLNR staff, the majority of the Land Board visited the site on September 24; its chair, Suzanne Case, went on her own on October 6.

The Right Venue

Whether the Land Board or the 1st Circuit Court should be the entity approving Chang Wo's replacement is a question apparently up for debate.

On September 25, less than a week after Chang Wo's passing, attorneys for the University of Hawai'i filed what's called a "suggestion of death upon the record" with the 1st Circuit Court — a "pretty rude" move, according to Frankel.

"They didn't need to do that so quickly," he says.

In its filing, the university cited rule 25(a)(1) of Hawai'i Rules of Civil Procedure, which states that if a party dies and the claim is not thereby extinguished, the court may order a substitution.

"The motion for substitution may be made by any party or by the successors or representatives of the deceased party," and it must be filed within 120 days after the death is suggested upon the record. Otherwise, "the action shall be dismissed as to the deceased party."

Frankel noted in a September 30 letter to 1st Circuit Judge Rhonda Nishimura that UH had failed to note in its filing that he had already filed a motion for substitution with the Land Board.

"Given the primary jurisdiction of the BLNR in this case as to the motion to substitute, the court should await the BLNRs' decision," he wrote.

Nishimura held an off-the-record status conference on October 2 with attorneys for all the parties. Given the Land Board's minute order, it appears that the court is at least allowing the NHLC's substitution motion to proceed. Whether or not it will require the same type of motion to be filed in the court case remains to be seen.

On October 23, all of the attorneys representing the permittees filed a joint memorandum with the Land Board opposing the substitution. They argued first that the Circuit Court, not the Land Board, had the authority to decide the matter. They added that, in any case, KUA was "not a proper party for substitution" because Chang Wo never transferred any of his personal rights to the organization.

— Teresa Dawson

For Further Reading

"Limu Stewards Oppose Plan to Alter Sand Berm in 'Ewa", Board Talk, May 2012;

"Board Grants Contested Case on Kalo'i Gulch Berm Project," Board Talk, October 2012;

"Does the Kalo'i Drainage Project Need a New EIS?" EH-XTRA, April 1, 2015.

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ing for an end to net metering. By and large, the PUC adopted that argument. In its decision and order, issued October 12, the commission stated: "It is abundantly clear that distributed energy resources" — rooftop solar, for the most part — "can provide benefits to Hawai'i. It is also clear, for both technical and economic reasons, that the policies established more than a decade ago must be adapted to address the reality of distributed energy resources as they exist today — and as they are likely to develop in the near future. The challenge … is ensuring that DER continues to scale in such a way that it benefits all customers as each utility advances toward 100 percent renewable energy."

But by doing away with NEM for all but grandfathered customers could the PUC have actually set the stage for even greater inequities? And rather than making the grid more stable, could its decision in the distributed energy resources docket serve instead to undermine it?

The Way Forward

Henceforth — or at least until the PUC reaches a decision in Phase II of the Distributed Energy Resources docket — customers wanting to install solar panels on their rooftops have two options.

They can have their panels linked to the utility grid, just as in the past, with the excess generation fed into the system that supports their neighbors and the larger customer service area — the so-called grid-supply option.

Or they can go the self-supply route, with installations having a capacity of 100 kW or less. In this scenario, the energy that is generated by the customer is used on site only. If more is generated than is being used at any given time, that excess is stored in batteries for later use.

Whatever option is chosen, distributed energy customers will still pay a base rate. Under the old NEM system, it was $17 a month. Now, however, it will be $25 — a rate that all parties to the docket seemed to agree upon as a more accurate reflection of the actual cost of utility service, apart from any energy usage.

The grid-supply option is essentially NEM without the equivalent value of energy used for energy supplied and with no ability to save credits earned one month against future use the next. (This, the PUC found, would provide "a reasonable incentive to 'right-size' generation capacity and avoid technical impacts associated with excessive over-generation during peak solar hours.") With customers paying the full cost of energy taken from the grid and getting just half that for what it puts back, the time required for the initial investment to pay for itself rises significantly, all else being equal.

But the PUC determined that investment in a grid-supply solar system was still cost-effective. The solar companies that participated in the docket "have offered no evidence that solar installers or [distributed energy resource] customers would be unreasonably impacted by energy credit rates in the range of 15 to 27 cents per kWh," the PUC found. "In contrast, the Consumer Advocate and [Department of Business, Economic Development, and Tourism] offer estimates that suggest that the approved grid-supply energy credit rates are still substantially higher than the levelized cost of installing residential solar today, after considering the substantial tax credits available in Hawai'i."

In what appears to be an effort to give a more stable base to investor expectations, the PUC guaranteed the credit rate for exported energy for two years (HECO had proposed a five-year guaranteed rate). "The grid-supply option," the PUC stated, "is intended as a transitional option for customers who wish to interconnect DER systems that export uncontrolled energy onto the grid, regardless of whether the power system can economically or physically accommodate such exports. While the grid-supply tariff will offer a lower energy credit rate than the NEM program, the credit rate will be fixed, rather than varying over time with fluctuations in the retail rate, thus providing additional value to participants."

But would anyone undertake a long-term investment with no more than a two-year assurance of the energy export price?

Robert Harris, public policy director for solar installer Sunrun, described this as "a critical problem. Customers are making a 20-year investment. If they don't know what the return will be in two years, it's hard to see an economic reason to 'go solar.' Also, interconnection can take up to a year. So the PUC's two-year [rate guarantee] could, in effect, really only be one year."

How customers and solar installers respond to the new pricing system will unfold over the next few months. In the main, however, it would seem that the short-term assurances and the discounted credit for energy contributions to the grid will combine to encourage customers to embrace the self-supply option.

And once they do that, the inducements to drop out of the grid altogether begin to loom large.

Self-Supply

If you are going to go to the bother and expense of installing solar panels, and want to get the biggest bang for the bucks, it makes little economic sense to sell off that fraction of energy you produce but don't consume at around half the cost you pay the utility for energy you draw from the grid during peak demand time.

The self-supply option allows customers to avoid this by storing the excess energy. In the past, battery systems for home use were sufficiently expensive to create a high financial hurdle. But by reducing the credit for energy contributed to the grid, the PUC has effectively lowered the financial bar.

Sunrun's Harris expanded on this in an email to *Environment Hawai'i*: "There's not a lot of solar-plus-storage offerings currently available, mostly because there hasn't been a market for it yet. This decision creates that market, and I anticipate the industry will adjust."

In the meantime, he continued, "it will cause a lot of pain and I anticipate you'll see smaller, local companies going out of business. This isn't a rational way to adjust markets. …

"HECO thinks this is a big win, but I'm not sure they're thinking long-term. We can already offer solar plus storage at a cheaper price than the utility. And the cost of storage will only come down."

Another advantage to the self-storage option is the ability to avoid a potentially long queue for utility approvals of the interconnection screen. Over the last couple of years, the queue has meant a wait of from a few months to more than a year before homeowners with new solar systems were able to hook them up to the grid under the NEM framework. New entrants in the grid-supply system will also need to get utility approval, and in its recent decision, the PUC did not impose any time frame within which this would have to occur. Instead, it merely requires ongoing monitoring of the HECO companies' performance in this area. Those installing the self-supply systems can proceed with a much more streamlined utility review.

"HECO companies shall provide written approval to operate a self-supply system within fifteen business days of receipt of a copy of the final governmental inspection or approval," the PUC ordered. (HECO had proposed a time frame of 30 days.)

Once a homeowner has invested in the solar panels and storage system, the next step could well be to drop out of the grid altogether. Says Harris: "If people have already paid 80 percent of the price to go

off-grid … what stops them from taking the additional step later?"

"A more rational decision by the PUC would have encouraged people to stay grid-connected, but to export power when the grid needs it the most," he continued. "We encouraged the adoption of time-of-use rates, but the PUC mangled that part of the decision."

Timing Is Everything

Every party to the proceeding proposed or endorsed a time-of-use proposal, which would have the effect of matching energy supply with demand more evenly throughout the daily cycle.

HECO proposed a pilot program under which just 500 distributed energy customers on O'ahu only would, over the next three years, be charged 36 cents per kWh from 4 p.m. to 9 p.m. but just 24 cents per kWh at all other times. The solar installers and their allies proposed two options: a two-phase plan with a much higher peak-demand rate (45.7 cents), and an expanded peak period (from 2 p.m. to 8 p.m.), or an even more complicated three-phase rate structure, with a minimum off-peak rate of 18.2 cents.

The PUC rejected everything, finding "the proposals presented … are not reasonable and should not be approved as submitted." HECO was told to refile a proposed time-of-use tariff by mid-November. The commission went on to note that it was "disappointed with the HECO companies' apparent ambivalence towards establishing an effective TOU option for DER customers. … It is unclear why the companies would suggest limiting a TOU rate design for DER customers to 500 participants or insist that the TOU rate only be offered to customers who are located near existing 'Smart Grid' infrastructure, which encompasses only a few neighborhoods on O'ahu. … The TOU rate should be available to any otherwise eligible customer on all islands served by the HECO companies. Absent a compelling need, the HECO companies shall meter and bill customer usage under the TOU tariff as they normally would any other TOU customer." In advising HECO how to structure its TOU rates, the PUC adopted the solar companies' proposal for a three-tiered system.

Next Steps

Now that Phase 1 of the docket has been completed, the PUC is now launching Phase 2. This, the PUC states, "will build upon the transitional market structure established" in Phase 1 to develop "longer-term policies to enable continued beneficial deployment of DER across the state."

Over the first six to twelve months, the parties will evaluate ways to "enhance the value" of distributed energy resources through integration and aggregation; will develop proposals to establish "an appropriate DER market structure;" and will continue to assess the challenges of integrating distributed energy resources into the various island grids.

At the conclusion of this process, the commission will "approve further changes to DER policies and programs with the aim of expanding cost-effective deployment of these resources throughout Hawai'i."

On October 22, The Alliance for Solar Choice (TASC) filed a lawsuit in 1st Circuit Court challenging the PUC decision, which it said violated state and federal law as well as due process rights. It claimed that by eliminating NEM, Hawai'i's solar industry would see cuts of up to 90 percent.

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Whither GEMS?

To expand the benefits of solar to groups generally unable to afford it, the state Department of Business, Economic Development, and Tourism last year floated a $145 million bond. The idea was that the bond would allow the state to give renters, low-income homeowners, and other underserved groups the wherewithal to obtain a long-term lease of solar panels or purchase them outright.

When the so-called Green Energy Market Securitization (GEMS) program submitted its last quarterly report at the end of July, it had yet to sponsor its first rooftop solar system. (The next report was due at the end of October.)

Environment Hawai'i asked DBEDT for a comment on the possible impact of the PUC's decision to eliminate net-energy metering on GEMS. In response, DBEDT director Luis Salaveria released the following statement:

"After the Public Utilities Commission issued its decision … the GEMS financing program informed loan applicants by email that loan applications submitted to the HEI companies on or before October 12 will not be affected. The GEMS financing program is working with its partner programs and consultants to analyze the potential impacts of the PUC's order on loan applications submitted after October 12."

When asked just how many loan applicants had been notified, DBEDT public information officer Alan Yonan clarified that the notification was emailed to the "nine approved GEM installers, who then shared it with prospective GEMS borrowers."

— Patricia Tummons

Net-Energy Metering: Too Successful for its Own Good?

Defending the decision to phase out new net-energy metering customers, the Public Utilities Commission noted that the NEM program "was simply not designed for … deployment at the scale experienced today." When the current NEM program was authorized in 2001, "the Legislature mandated a cap on customer participation at 0.5 percent of system peak load (an increase from the original NEM program cap of 0.1 percent of system peak load)." With the Legislature's blessing, the PUC allowed participation to increase to the point where "NEM program capacity now represents between 30 percent and 53 percent of each of the HECO companies' system peak load. Participation in the NEM program is now approaching twenty percent of all customers on the HECO and MECO systems."

Capacity (MW)	HECO	HELCO	MECO
Installed or approved	327.9	73.3	88.8
In the queue	17.3	5.1	11.9
Total	345.2	78.4	100.7
Total NEM Customers	51,680	11,549	12,893
System Peak Load (MW)	1,165	188	191
NEM % of all customers	17	14	18
NEM % of System Peak	30	42	53

BOARD TALK

Board Approves Concrete Fish Houses In Hanauma Bay, Waikiki Sand Channel

On September 25, the state Board of Land and Natural Resources approved a one-year special use permit to Mark Hixon, a professor of marine biology at the University of Hawai'i, for the deployment and study of artificial reef modules in the Hanauma Bay Marine Life Conservation District and Waikiki. If the modules successfully recreate coral reef habitats, Hixon told the board, they could prove to be valuable tools in mitigating the impacts of climate change and intensive fishing.

Artificial reefs are nothing new and, in fact, the state has constructed a number of them. But according to Jack Randall, senior ichthyologist at the Bishop Museum, those reefs "have not provided the appropriately sized shelter for fishes."

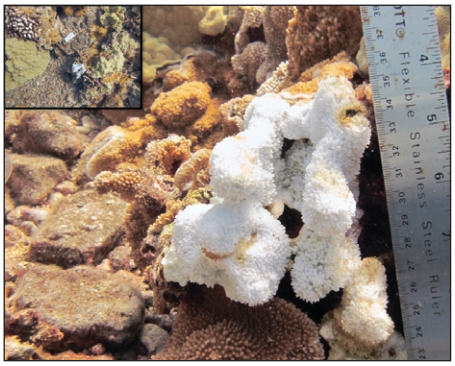
Hixon's work could remedy that.

A year ago, Hawai'i suffered the greatest coral bleaching event in its history, he told the Land Board.

"We were lucky that time. Most of those corals recovered. … We're now on a coral bleaching watch well into the fall. We've been lucky so far, but the projections are that the intensity and frequency of events will be increasing. Our luck will not last forever," he said.

Indeed, shortly after his presentation to the Land Board, the state experienced another unprecedented bleaching event. By early October, the Department of Land and Natural Resources' Eyes of the Reef Network had more than 100 bleaching reports in a matter of days.

Bleached corals can recover if larvae are able to settle. Otherwise, they are overcome by seaweed. Hixon said he's seen reefs die from coral bleaching, taking with them the biodiversity and ecosystem services the reefs support.



Bleaching from last year's event at the Molokini Marine Life Conservation District on Maui.

A holed reef module in the Bahamas is surrounded by fish and overgrown with coral and sponges.

A key factor in reef recovery is the presence of herbivores, such as parrotfish and sea urchins. If they're present in reasonable numbers, dead corals are kept clean and larvae can settle and grow. But the problem on O'ahu, he said, is that intensive fishing has severely reduced the abundance of herbivorous fishes, especially parrotfish, otherise known as uhu.

According to a reef assessment by the National Oceanic and Atmospheric Administration, O'ahu has by far the lowest abundance of reef fish of any of the Hawaiian islands.

On the deep sand flats of Hanauma Bay, Hixon plans to build six fish houses to locally enhance herbivores and help corals persist as they suffer the effects of bleaching. Each house, or "artificial coral module," would consist of 48 concrete blocks. Because fishing is prohibited in Hanauma Bay, the modules there will serve as a control site to determine the effects of fishing. Some of the blocks will have holes in them, some will not. Those without holes are meant to simulate dead reefs that have lost their structural integrity.

"The proposed deployment location in Hanauma Bay is well beyond the sight of the vast majority of the visitors to the MLCD and will therefore have little impact on the visitor experience. In addition, this research can be used as a valuable opportunity to educate the public and visitors on the benefits of healthy reefs and how we can manage for resilience," UH scientist Alan Friedlander wrote in an April 14 letter of support to the DLNR's Division of Aquatic Resources (DAR).

Hixon said he will monitor the modules to determine whether the fish that aggregate around them are local or are transplants from other areas. Hixon has already built 52 such structures in the U.S. Virgin Islands and has done similar work in the Bahamas. In both cases, he said, the modules attracted fish and spurred coral colonization.

"They eventually grow into natural structures. When organisms settle and grow, you get coral growth where there wasn't before," he said.

The modules to be placed around O'ahu could become natural features, but they can also be removed, Hixon said.

At DAR's request, the university's Office of Research Services has entered into a Memorandum of Agreement to ensure that Hixon remains responsible for the maintenance or removal of the modules. Should the modules be removed, he would also be responsible for the cost of returning the sand flat to its original condition.

Land Board member Keoni Downing expressed some concern about the stability of the modules during a hurricane. Hixon replied that the modules in the Bahamas have been hit by a number of hurricanes and are still standing.

He added that the modules are the first step in a two-pronged approach to restore reef ecosystems. Researchers are also working to identify corals that are resistant to bleaching and transplant them.

"If all there is out there is seaweed, they're not going to grow. We have to have an acceptable environment. The danger we face on O'ahu is a phase shift," he said, referring to what happens when a reef ecosystem becomes dominated by algae. And because O'ahu has such low fish abundance, that's a real danger.

Unless bleached corals are kept free of seaweed so they can be recolonized, worms and other boring organisms break the corals down.

"I can't tell you how ugly it is to see that," he said.

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Board Approves Rules To Manage Surf Schools at Kahalu'u Bay

After about a decade of effort by the community, new rules aimed at taming the unruly and unsafe surfing and swimming conditions at Kahalu'u Bay in West Hawai'i were approved by the Land Board on October 9.


Kahalu'u Bay in West Hawai'i.

The rules establish a zone in the bay within which commercial surf schools may operate and limits the number of schools to four. Each school, which must obtain a permit from the DLNR's Division of Boating and Ocean Recreation, may have no more than eight students in the water, with no more than four students per instructor.

DOBOR had first asked the Land Board to approve the rules in August, but members Keoni Downing and Stanley Roehrig, both experienced surfers, balked at endorsing rules that they thought were unsafe. Both expressed their concern that four students to one instructor was inadequate. Downing, who teaches surfing, said at times, depending on the age of the client, he has two instructors for one student.

Because no members of the Kahalu'u community were in attendance at the Land Board meeting that day to explain how they came up with the 4-1 ratio, the matter was deferred.

When DOBOR brought the matter back to the board last month, Kenneth Van Bergen of the Hawai'i County Department of Parks and Recreation and Cindy Punihaole of The Kohala Center testified in support of the rules as proposed.

Because Hawai'i Island is such a young island, there are few accessible beaches, so surf schools congregate there, creating a lot of congestion, Van Bergen said.

"I've seen 60 students in the water [at Kahalu'u Bay], not including locals," he said, adding that the schools are "congregating on the street with their vans and trucks with 15 boards."

Downing suggested that the county could have stepped up its efforts years ago to enforce or adopt its own rules restricting parking or using county property.

"It's something that the county could have helped solve from the road to the shore. … You're wanting us to work on something from the ocean. They still gotta get from the road to the beach to the ocean," he said.

Van Bergen, who only recently joined the Parks Department, told Downing he had a valid point and said he didn't know why the county hadn't addressed it earlier.

Punihaole assured the Land Board that the county would be working on managing the problems at Kahalu'u, but the community still needed the board to help "build a safety issue into the equation."

"The zones and surf school [limits] is what we need from you," she said.

A DOBOR staffer added that the county will be taking responsibility for the concessions, while a non-profit group will ensure compliance on the beach.

Land Board member Chris Yuen added that once the rules cap commercial surf schools at four, the county can impose stricter limits.

Roehrig urged the county to pursue a plan to reduce the student-teacher ratio when the surf gets big.

"If someone gets hurt, the first people going to get sued is the state. The county is going to get sued because they had inadequate lifeguards," he said. "We had a quadriplegic in Ka'anapali [as a result of a surf school accident]. There's a big lawsuit going on right now in federal court in Honolulu. This is not a small matter. … That's why we're a little bit hilahila (shy) about the way it is, at least me and Keoni."

Even so, he and the rest of the Land Board unanimously approved the rules, which also establish a swimming zone where all vessels, including surfboards, are prohibited.

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Dillingham Ranch Gets Access, Utility Easements

As far as Land Board member Chris Yuen was concerned, the September 25 request by Dillingham Ranch Aina, LLC, for perpetual access and utility easements in favor of its land-locked mauka property was no different from dozens of similar requests the board had granted over the years. The ranch's highly publicized and controversial proposal to develop 94 small lots on its makai lands was immaterial.

But representatives from the Sierra Club, Hawai'i Chapter disagreed and urged the board to deny the easements, which would connect the ranch's upper 500 acres to its 434 acres of makai lands. They argued that the easements would facilitate the development and would thereby contribute to the cumulative impacts on the property and surrounding areas. As a result, they argued, the Land Board could not exempt the easements from undergoing an environmental review. Should the board approve the easements, the Sierra Club said it would want a contested case hearing.

Although the ranch said it planned only to graze cattle on the mauka lands and not develop them, the Sierra Club argued that those cattle might be used by the ranch to create the semblance of agricultural use to justify the "fake farm" development. Indeed, the ranch's Clifford Smith told the Land Board that the state Department of Agriculture was requiring the ranch to not only maintain its cattle herd of 120 animals, but increase it to 220.

But Smith also noted that the ranch's subdivision application with the city had expired. So as of the date of the Land Board meeting, there was no pending development.

Yuen later noted that if the ranch does eventually decide to proceed with the subdivision, the City and County of Honolulu is the primary authority.

"The planning director will make the decision as to whether they need an EA [environmental assessment] or EIS [environmental impact statement]," Yuen said.

According to statements Smith had made, "it sounds like they will have to do an EIS. They will have to do one or the other," Yuen continued. "Dissatisfied people can file suit. … Right now, they don't have a subdivision application."

"I think that's very convenient. [What about] ten minutes from now?" asked Hawai'i island Land Board member Stanley Roehrig, who seemed to share the Sierra Club's concerns.

Yuen countered that if the ranch never proceeds with a subdivision, "how many years do they have to wait before they get the easement?"

The Land Board had actually approved an easement in 2008, but it was never executed. And since then, the ranch has decided it would like to move the easement and add one for utilities to bring water to the mauka lands. Roehrig asked Smith whether the easement would have a nexus with the proposed development.

"It could. It would be a subdivision road [but] it's not going to have a road that has 5-acre lots on it," he said. He added that the mauka acres are too steep to build houses on and that the ranch planned to split it into no more than two parcels of 250 acres each.

Despite the Sierra Club's concerns, Yuen said he just didn't see a connection between the 500 acres being subdivided into two lots "and whatever happens on the 90-lot subdivision below. I don't get it. What's the problem? … I suspect had there not been

this 90-lot subdivision proposed, this would have been an item that just breezed by."

"I don't even see a change in use," Land Board chair Suzanne Case added.

In the end, the Land Board approved a motion by Yuen to grant the easements on the condition that they serve no more than two lots. Board members Roehrig and Keoni Downing opposed Yuen's motion.

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Turtle Bay Deal Wins Land Board Approval

On October 23, the state formally acquired a perpetual conservation easement over 560 acres at Turtle Bay Resort and the fee simple interest in 52 acres at Kawela Bay, forever protecting the lands on O'ahu's North Shore from large-scale development.

About a month earlier, the Land Board approved the $37.5 million deal that was approved by the state Legislature and Gov. David Ige this past session. The board's vote was unanimous, but some members lamented that under the terms of the deal, in which the state will immediately lease the Kawela lands back to Turtle Bay for the next 65 years, the resort may continue using the 52-acre parcel for weddings, surfing lessons, tours, and the like, while dictating where and when members of the public may traverse it. Given that the bulk of the state's $35 million contribution toward the purchase is for the Kawela lands, the board questioned whether legislators knew what they were voting for when they passed the bill laying out the terms of the purchase.

Doug Cole, director for the North Shore Community Land Trust, contended that the Legislature knew exactly what it was doing. In agreeing to sell the fee to the state, Cole said, Turtle Bay's condition was that they could continue doing what they were doing.

"Sixty-five years from now, the state will have the option of taking full control of that. … It's about kids not yet born," he said.

Turtle Bay Resort CEO Drew Stotesbury explained that the fee simple sale was actually a hard thing for his company to accept.

"It took a lot of hard work to accomplish that. … What we end up with is a very solid compromise. We understood the value to the state to hold the fee, … but we also had this understanding that we wanted to continue our business and honor our existing rights and uses," he said.

Turtle Bay was also able to negotiate terms in the lease that will allow it — with Land Board approval — to build minor structures and install infrastructure on the state land. In total, the improvements will cover no more than 3,000 square feet and will facilitate the development of the resort's adjacent land.

In any case, Lea Hong, director of the Trust for Public Land's Hawaiian Islands program, told the Land Board, "I don't think in the years to come people will question how much we spent here."

Protecting such a huge swath of coastal land from development not only benefits natural resources and the community, it also resolves years of litigation and, as state Attorney General Doug Chin put it, "emotional angst" over the resort's efforts a decade ago to build more condos and five new hotels that together would add 3,500 units to the property.

"A pubic-private partnership is a very difficult phrase to actually put into practice," he told the Land Board. "This is pretty close. This is about as close as I've seen."

The resort is still on the hook to remediate any contamination found during a second phase of environmental studies of the property. Phase one found there had been a release of chemicals related to the golf courses and a data gap regarding the old Kahuku airfield, which was overrun by a tsunami in the 1940s.

The state is requiring Turtle Bay Resort to hold $500,000 in escrow to cover the cost of any cleanup, which would occur after the sale closed. The resort had initially offered only $250,000.

For Further Reading

Environment Hawai'i has written extensively on Turtle Bay Resort's proposed expansion over the years. For more background on this issue, see the following stories in our archives at environment-hawaii.org:

"Spurred by Kuilima, Environmental Council Considers Shelf Live of Disclosure Documents," and, "Agreements Require Kuilima Developer to Fulfill a Wide Range of Conditions," June 2006;

"Commission Delays Forcing Developer to Justify Urban Designation at Kuilima," March 2009;

"State Supreme Court Hears Arguments Over Supplemental Review of Kuilima Expansion," and "Land Use Commission Tries but Fails to Resolve Dispute over Kuilima Resort," March 2010;

"Land Use Commission Defers Decision Regarding Turtle Bay Resort Redistricting," December 2013; and

"Governor Signs Turtle Bay Bill," Board Talk, July 2015.

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Termination of Honey Bee Lease Is Deferred Yet Again

Will the state Division of Boating and Ocean Recreation (DOBOR) let stand the Land Board's September 25 decision to terminate Honey Bee USA's lease for the Ala Wai Small Boat Harbor on November 15, or will it recommend that the board rescind it?

As of press time, it wasn't clear, but given the time needed for the division to have a recommendation ready for inclusion in the public notice of the Land Board's November 13 meeting, Honey Bee would have had to secure $35 million from its investment partner in the Waikiki Landing project at the harbor by the end of the October.

DOBOR had recommended twice before that the Land Board terminate Honey Bee's lease after the company fell behind on its rent and failed to post a performance bond. The last time, in July, Honey Bee promised that it would either secure funding by the end of August or walk away from the lease.

Honey Bee failed to provide funding by its own deadline, but rather than abandoning its lease as promised, company representatives Keith Kiuchi and Deron Akiona appealed to the Land Board on September 25 to extend that deadline to December.

Kiuchi tried to explain that Honey Bee's partner, ICON, has the money, but it was tied up in a Hong Kong bank.

"They're at the mercy of the bank in Hong Kong, which is at the mercy of the world market," Kiuchi said. "It's not a question of if they'll fund, it's a question of when they'll fund."

He said the money was expected to be wired to an account with the Bank of America in the first or second week of October.

Akiona reminded the Land Board that the DLNR has already benefitted significantly from its relationship with Honey Bee. The department has received almost $1.2 million in rent and development fees.

"The state would have gotten a little over $600,000 under the pre-existing lease," Akiona said. He added that Honey Bee has spent $4.7 million just to make the property developable.

"I'm not going to say this as a criticism, but I want to make this clear: when DLNR put the [request for proposals for the Ala Wai development] out, it didn't even have clean title to the parcel," he said, noting that the state Department of Transportation (DOT) and the DLNR both claimed title and there were private owners, as well.

"The developer cleaned up this whole mess. … It took a lot of time and capital," he said, adding that the jurisdiction over the Ala Moana bridge is still in question.

"DOT has still not given it up," he said.

Akiona argued that if the Land Board canceled Honey Bee's lease, it would be stuck with an inoperable fuel dock and a parking lot that would likely be invaded by the homeless. What's more, he continued, any new developer will likely have to wait in line for years to get a permit to connect to the city's sewer system.

"We want to make this project work. We have 32 leases already signed for this project, 32 people already expecting to move … a lot [of them] relocated from the International Marketplace," he said.

Akiona's arguments and promises rang hollow with DLNR staffer Keith Chun who is assisting DOBOR in overseeing Honey Bee's lease.

"It's nothing new. This has happened over and over again," Chun told the board. He noted that Honey Bee had provided the DLNR with an unsigned loan agreement between Honey Bee and ICON shortly before the board's meeting

"If ICON was committed it would have signed," he said.

Chun continued that DLNR staff had received at least five different funding proposals from Honey Bee, none of which have come to fruition.

"I used to wake up every morning thinking Santa Claus going come …," he said of the likelihood that the funding would come through this time.

In addition to the funding issue, Chun voiced his skepticism of whether ICON or Honey Bee had the development expertise to see the project through. When DOBOR initially selected Honey Bee to develop the harbor, it was wholly owned by a Japanese principal who had a track record of developments in Japan, as well as ample financial resources, Chun noted.

"That guy's come and gone. He's a one-percent owner now," he said.

Chun recommended that the Land Board terminate the lease and start over. He said it would take more than a year to prepare a new request for proposals that takes advantage of legislation that allows greater use of the property than is allowed by current city zoning.

While Land Board member Stanley Roehrig encouraged Chun to consider giving Honey Bee until December to get its funding together, Chun again expressed his concern about the lack of expertise of both Honey Bee and ICON.

"If Honey Bee came with its current structure for an RFP, I don't know if we would find them qualified," Chun said, adding, "I know absolutely nothing about ICON. It formed in 2006. They allegedly are funding projects but are not allowed to say anything about it."

That was ludicrous, he said.

Several Land Board members shared Chun's concerns.

"How many more times are we going to be at the end of the noose and you say, 'Wait, not yet,'" board member Keoni Downing asked Akiona. "Yeah, you've paid a lot of money. That's the risk a businessman takes to make money."

Board member Chris Yuen noted that had the Land Board approved DOBOR's recommendation back in March to terminate the lease, the division would be moving forward with a new RFP.

When it came time to vote on the matter, Roehrig moved to accept Honey Bee's recommendation of holding off terminating the lease until December.

"This is a close call for me, but we're just about to the end of the year anyway. If we move to terminate the lease effective December 31, there is a window of opportunity we may put a deal together," he said.

Some of the other board members, however, weren't biting.

"With all respect for my other board members, I was done the last time. The principals for Honey Bee have argued their case very effectively. I have accepted their reasons twice in the past. … What I am hearing is not giving me a great deal of hope," Yuen said.

"I think they are operating on the basis of hope at this point, ... dealing with a lender that is very mysterious to me, promising to lend money they don't have," he continued. What's more, board member Ulalia Woodside raised the possibility that ICON wouldn't have the money anytime soon, noting that it was unclear whether the Hong Kong financial market had improved.

Board chair and DLNR director Suzanne Case agreed with Yuen that the lease should be terminated. Had Honey Bee even partially cured its defaults or provided adequate loan documents, she said, she might have

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Hawai'i Supreme Court Clears Way For Lawsuit Over DBCP Injury Claims

More than a year after the Hawai'i Supreme Court heard oral arguments, it has issued its decision in *Patrickson v. Dole*, a case that revolves around harm to Central American workers exposed to DBCP, or dibromochloropropane. That chemical was widely used in the United States until the Environmental Protection Agency banned its use in the 48 mainland states in 1978; it took another eight years before pineapple growers on Maui were forced to stop using it on their fields.

In banana plantations of Central America, however, DBCP continued to be applied, in ways that resulted in even higher levels of exposure to workers. In 1997, several of those workers sued in Hawai'i circuit court the companies that manufactured the chemical and the fruit companies that owned the plantations where it was used.

The Hawai'i lawsuit is the lone survivor of a spate of legal actions brought against these defendants. The history of litigation is complicated and goes back more than two decades, with the injuries they claim going back even longer. As *Environment Hawai'i* noted last September when we first reported on the case, many of the plaintiffs did not realize their injuries resulted from DBCP exposure until they learned of the link from human-rights organizations that had begun working with DBCP-affected workers.

The litigation in Hawai'i has not yet reached the point where the plaintiffs can argue their case before a jury. Almost from the outset, the arguments have been over side issues. Should the case be in federal court, for example. Or was it timely filed?

The disputes went all the way to the U.S. Supreme Court, which ultimately determined that the state circuit court was the proper venue.

On July 30, 2009, nearly 13 years after the lawsuit was filed, 1st Circuit Judge Gary W.B. Chang granted the defendants' motion for partial summary judgment on the ground that the statute of limitations had expired before the plaintiffs brought their lawsuit. But it took almost another year — until July 26, 2010 — for Chang to file the judgment, which was required before the plaintiffs could appeal.

Appeal they did. And wait they did. It took another three and a half years – to March 2014 – before the Intermediate Court of Appeals upheld the lower court.

While the state Supreme Court took up the case in relatively short order following the ICA decision, hearing the case in September 2014, yet another year passed before it issued its ruling on October 21 of this year.

That ruling keeps the lawsuit alive by rejecting the lower court and ICA determinations that the litigation was barred by an expired statute of limitations. The Supreme Court remanded the case to the 1st Circuit for further proceedings.

The decision is an important one in the history of Hawai'i jurisprudence, setting forth guidelines for determining cross-jurisdictional tolling. It's a fine point, to be sure, but had it been in place before Patrickson, the case might have reached the point where it is now years earlier.

Nor is this the first legal landmark growing out of this case. A 2003 decision by the U.S. Supreme Court, known as *Dole v. Patrickson*, determined the circumstances under which foreign governments and their agencies can enjoy immunity from lawsuits brought in U.S. courts.

Despite these important outcomes, at heart, the case remains one of a handful of former plantation workers seeking justice for themselves and their families for the harm done them by exposure to DBCP. Now, some 30 years after the injuries are alleged to have occurred, they may finally have their day in court. ***— P.T.***

For Further Reading

Environment Hawai'i reported extensively on this and related litigation, involving a Hawai'i worker, in our September 2014 edition. See:

"Claims of Harm from DBCP Kept Alive in Lawsuit before State Supreme Court;"

"Hawai'i Plaintiffs Await Court Action on Complaints of Injury from DBCP;"

"In 30 Years of Litigation, Only Once has a Jury Heard Case on the Merits."

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had more confidence in its promises.

When Maui Land Board member Jimmy Gomes added that he, too, wasn't comfortable with allowing the lease to continue to December, Kiuchi suggested an earlier termination date.

"If anyone wants to light a fire under ICON, I do," he said.

Akiona added that even if ICON provides its funds in time, the Land Board still has to approve it as a co-lessee.

"You can still vote them down," he said. "If you think ICON is that unstable, with $35 million in the bank, you get to cancel them as the owner."

With great reluctance, the Land Board — except for Case — agreed to a deadline of November 15.

(For more background on this, see our April and August 2015 Board Talk columns, available at environment-hawaii.org.)

— T.D.