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Wicked Tuna Boats

As evidenced in recent revelations by the Associated Press of human traffickers supplying crews to foreign fleets, the operations of some foreign-flagged commercial fishing vessels are hard to stomach.

But many of the same type of purse-seine vessels flying the U.S. flag are hardly better. The rules under which they operate are so watered down as to be practically meaningless. Ownership of many of the vessels traces back to global fishing concerns, even if the nominal owners meet U.S. citizenship requirements. Enforcement of the lax rules that apply to the fleet is spotty and difficult, given the thousands of miles that separate the seas where the vessels fish from the usual reach of the U.S. Coast Guard.

It may be that other nations' fleets are worse, but if that is the best that can be said about ours, we should be ashamed.

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Rift in U.S. Purse Seine Fleet is Laid Bare In Comments on Tri Marine Petition

In this issue, Environment Hawai'i takes a closer look at the U.S. purse seine fleet fishing in the South Pacific. Although the purse seiners fish thousands of miles from Hawai'i and none regularly pulls into port in Honolulu, they are subject to regulation by the National Marine Fisheries Service's Pacific Islands Regional Office and the U.S. Coast Guard 14th District, both headquartered in Honolulu.

Given that purse seiners account for almost all the take of juvenile bigeye tuna, it is impossible to understand the disputes over depletion of bigeye stocks without some notion of the role played by the purse seine fishery.

Last May, Tri Marine International, owner of one of two tuna canneries in American Samoa, petitioned the National Marine Fisheries Service. The goal was to get NMFS to adopt a rule that would allow U.S. purse seiners delivering at least half their catch to American Samoa to keep on fishing in the South Pacific past the time when the vessels would be shut out of fishing on the high seas and in waters of the U.S. Exclusive Economic Zones under a fishery management scheme adopted by the Western and Central Pacific Fisheries Commission (WCPFC).

In its petition, Tri Marine cited economic factors that together posed a hardship on purse seiners based in American Samoa and which put "the ability of these tuna vessels to operate profitably … in serious question…. The loss of a reliable supply of tuna from these vessels will jeopardize the ability of the canneries in American Samoa to compete in world markets with lower cost competitors."

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PHOTO: WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL

Purse seine vessels have been hauling more and more bigeye tuna, which often intermingle with the targeted skipjack schools gathered around fish aggregating devices

Environment Hawai'i

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NEW AND NOTEWORTHY

Invasive Initiative: The state's ability to deal effectively with invasive species has been sorely challenged of late, with the rapid spread of the little fire ant, coconut rhinoceros beetle, coffee berry borer, coqui frogs, weeds too numerous to count, and the recent looming threat of the fungus causing rapid 'ohi'a death.

To its credit, the state Department of Agriculture, charged by law with addressing invasive species of all sorts, sought in October to explore the feasibility of establishing a new agency, attached to the department, that would address "invasive species and biosecurity coordination among state and federal partners." It proposed to do this with a series of meetings facilitated by Peter Adler, doing business as The Accord Group. Adler's history of mediating difficult issues goes back at least as far as his facilitation of meetings in the 1980s that led ultimately to passage of the Hawai'i Water Code.

The DOA submitted a request for exemption from the state's bidding process to the chief procurement officer in mid-October. Under the scenario outlined in an attached justification, the department anticipated that Adler would hold a series of meetings with stakeholders from mid-October through December 4, with Adler providing the DOA with a summary of their concerns by December 10. For this, the DOA proposed to spend $14,052.57.

The request was disapproved on November 2, with the chief procurement office's Bonnie Kahakui stating that it "lacks sufficient justification. … Based on the vendor's proposal, work includes creating surveys, conducting interview [sic], preparing reports, consulting with the project lead etc. These are consulting activities versus facilitation. The department shall use the appropriate method of procurement for the required services (i.e., Request for Proposals…)."

As of press time, the DOA had not posted any RFP on the state's website.

Rapid 'Ohi'a Death: Speaking of 'ohi'a wilt, the fatal fungus has now spread to the western side of Hawai'i island — specifically, near Holualoa and Kealakekua.

For the latest information on the disease, see http://www.rapidohiadeath.org. J.B. Friday, the extension forester with the University of Hawai'i's College of Tropical Agriculture and Human Resources, updates the site regularly. Also available on the site is a printable three-panel brochure about the disease, a link to an October presentation at the Hawai'i Volcanoes National Park, and much more useful information.

GEMS Still Batting Zero: For the first 10 months of its existence, the Green Energy Market Securitization program (GEMS), financed with $145 million in bonds to help underserved homeowners and renters obtain energy-saving technologies they are otherwise priced out of, issued no loans at all.

That is according to the latest report that the Department of Business, Economic Development, and Tourism submitted to the Public Utilities Commission summarizing activities up to the conclusion of the third quarter of the program's operation, ending September 30. The total number of completed applications received since the program launched in November 2014 is 149, 43 of which were from non-profit organizations able to qualify for loans of more than $150,000. Forty-one of those were classified as "under review," while two were declined.

A total of 106 residential applications were received, 35 of which were declined, five withdrawn, and 66 "under review."

A financial summary reported that GEMS' current assets amounted to $145,891,273.34 as of September 30. Expenditures of $111,909.27 — all for the cost of administering the program — were offset by just $6,437.26 in interest.

But the "financial summary" does not tell the whole story. According to a worksheet that Hawaiian Electric gave DBEDT last May, from December 1, 2014 through June 30, the company anticipated that Green Infrastructure Fee collections from utility customers would total $7,976,862.60. That entire amount -- 45 percent of which comes from residential ratepayers – goes to pay the principal and interest on the GEMS bonds. By the year's end, the utility will need to collect $7,940,691.56 more to fulfill "revenue requirements" for GEMS.

Framed another way, GEMS has cost electric ratepayers more than $15 million since November of 2014. And as of September 30, the state had not one kilowatt of renewable energy installed to show for it.

Quote of the Month

"Don't level the playing field with a bunch of paper."

— Mike Tosatto, NMFS

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

Patricia Tummons, Editor
Teresa Dawson, Staff Writer

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Environment Hawai'i
190 Keawe Street, Suite 29, Hilo, Hawai'i 96720.
Telephone: 808 934-0115. Toll-free: 877-934-0130.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
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Hawai'i Longliners' Bigeye Quota Extended for Second Time This Year

This year, the 144 longline vessels based in Honolulu raced through their annual catch quota for bigeye tuna established by the international commission regulating fisheries in the Western and Central Pacific Ocean. By August, they had caught most of the 3,502 metric tons that they were limited to for 2015.

In August, the National Marine Fisheries Service shut the fishery down. Most vessels (all but the largest in the fleet) could continue to fish for bigeye in the Eastern Pacific, but the fishing grounds there were more distant and, at that time of the year, weather was unsettled; there were, after all, a record number of named tropical storms in the Eastern Pacific this year. In addition, some vessels that hold federal fishing permits allowing them to fish in Hawai'i and American Samoa could continue to operate and deliver fish to the Honolulu auction house.

> *"It's well established that even without the U.S. fishery, if we took that off the table, it wouldn't have any impact on bigeye overfishing."*
>
> ***— Eric Kingma, Wespac***

The shut-down lasted until October 9, when NMFS announced that the Commonwealth of the Northern Mariana Islands, a U.S. territory, could sell up to half of its 2,000-metric-ton bigeye quota to those Hawai'i vessels that were members of the Hawai'i Longline Association. The HLA had entered into an agreement in 2014 with the CNMI that allowed this purchase, satisfying one of the terms of the quota assignment set by a recent amendment to the federal fishery management plan for tuna in the Western Pacific.

Over the next few weeks, the Honolulu longline fleet once again began to land bigeye at a record-setting pace – the same pace that had allowed the boats to eat through their quota by August.

On November 27, NMFS announced that the CNMI quota allocation of 1,000 metric tons would be reached by November 30. After that, all bigeye caught will be charged against a second territorial quota – that of Guam.

Guam Saves the Day

On November 6, NMFS published a final rule that sets the 2015 bigeye quota for the U.S. territory of Guam at 2,000 metric tons, half of which could be assigned to the Honolulu longliners.

Before the Guam quota can be transferred, however, the government of Guam and the HLA — through its subsidiary, Quota Management, Inc. — need to agree on terms, including how much HLA will pay for the fishing rights. The agreement then must be submitted to the Pacific Islands Regional Office of NMFS for its approval.

As of late November, this had not been done.

Mike Tosatto, PIRO administrator, told *Environment Hawai'i*, "We know that HLA and Guam are talking, but I have not see any agreement yet."

David Henkin, the Earthjustice attorney for environmental groups challenging NMFS in federal court over the quota-shifting arrangement, notified Judge Leslie E. Kobayashi of the development:

"The specifications [in the new rule] are expressly designed to allow Hawai'i-based longliners to continue to catch bigeye tuna, without interruption, after they exhaust the current, 1,000-metric-ton allocation agreement with … CNMI," Henkin wrote. The new rule as well as the earlier one for the CNMI "purport to allow the Hawai'i-based longline fleet to circumvent the 2015 bigeye catch limit for U.S.-flagged longline vessels established by the Western and Central Pacific Fisheries Commission."

(Kobayashi heard arguments on the lawsuit in late September. As of press time, she had not issued a ruling in the case.)

And if the Guam quota doesn't hold till the end of the year? Well, there's always American Samoa — provided the federal court upholds the quota-shifting arrangement.

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Spatial Quotas?

At the October meeting of the Western Pacific Fishery Management Council in American Samoa, a good part of the discussion focused on a concept that could change the way bigeye quotas are established.

A map of bigeye catches across the Pacific Ocean reveals that the areas visited by the Honolulu longliners are lightly fished in comparison to other regions. Wespac staffer Eric Kingma suggested that the fishing effort in these regions could be increased substantially without damaging the prospects for recovery of Pacific bigeye stocks. "It's well established that even without the U.S. fishery, if we took that off the table, it wouldn't have any impact on bigeye overfishing," Kingma told the council.

"The take-home message here is, basically, even with the Hawai'i longline fishery combined with territory transfers in each year – even if you're catching 7,000 metric tons in total, there is still a less than 1 percent change to the baseline status stock reference points. … Even with the transfers, it's not impeding international conservation objectives to achieve or eliminate bigeye overfishing in combination with the measures adopted by the Western and Central Pacific Fisheries Commission."

Those measures, he went on to say, are working. The SPC – Secretariat of the Pacific Community, which monitors fisheries in the region — "has evaluated the current Conservation and Management Measure (CMM)" for bigeye, Kingma said, "and the measure is working. … In the future, the measure is expected to have an effect by 2032 so we're no longer in an overfishing condition."

Of course, he continued, "that depends on a few things: that countries will fully implement the measure and recruitment is maintained. All indications are that this is likely to occur as well. So the measure is working. We're meeting conservation objectives."

(The SPC's evaluation, released last month, indeed projected that under its most optimistic scenario for the CMM, overfishing would, in fact, end well before 2032. The organization noted that the longline sector's 2014 catches were generally in line with the optimistic scenario, in which commission members chose the more conservative fishing limits allowed under the CMM. However, the SPC added, "This is qualified by the fact that: there are [commission members] whose fleets have no limit within the measure, and whose bigeye catches have increased since 2012; and that while we are working with the latest 2014 longline data, … bigeye longline catch data for the most recent years tends to be revised upwards over time." What's more, the organization noted that the

number of sets on fish aggregating devices by purse seiners did not "appear to be 'on track'" with the optimistic scenario.)

In the area fished by the Hawai'i vessels, Kingma stated, "there is very little difference between spawning stock biomass" — a measure of the ability of the fish to reproduce — "and virgin biomass" — the abundance of the stock before it was subject to fishing. Throughout the Western and Central Pacific, he said, "spawning stock biomass is estimated around 20 percent of pre-fishing biomass, so it's not as though the fishery is falling off the cliff."

Keith Bigelow, a fisheries biologist with the Pacific Islands Fisheries Science Center, a research arm of NMFS, provided further details on the way in which bigeye tuna in the regions fished by the Hawai'i vessels could be "spatially disaggregated" from the rest of the Western Pacific. This, he suggested, could be used in developing a proposal for consideration by the WCPFC at its December meeting.

"The conceptual idea is to have exploitation be in proportion to subregional abundance," Bigelow said.

Charles Daxboeck, who chairs the council's Scientific and Statistical Committee, reported that the SSC "would like to see the WCPFC stock assessment regions be quota-apportioned according to stock estimates within each region, as opposed to an overall quota system." This, he continued, "would be more equitable, based on the fact that our fishery has a limited impact in the tropical zone."

The full council approved a recommendation to the National Marine Fisheries Service that it develop the spatial management idea into a formal proposal for WCPFC.

— Patricia Tummons

Purse Seiners from page 1

Tri Marine, one of the giants in the tuna industry, has its own purse seine and longline vessels, either owned outright or under contract; processing centers on five continents as well as several Pacific Island states; and a global marketing network. Ten of the 38 purse seiners that currently make up the U.S. fleet fishing in the South Pacific are owned by firms closely affiliated with Tri Marine.

Apart from the Tri Marine vessels that deliver tuna to the Pago Pago canneries, at least six other U.S.-flagged purse seiners regularly deliver there as well, according to Tri Marine.

In an effort to provide a legal foundation for the request, Tri Marine's attorney, James P. Walsh, argued that under the WCPFC, American Samoa has the right, as a Small Island Developing State (SIDS), to develop its fishery without regard to limits established by the commission's conservation and management measures. This, Walsh contends, is an argument that NMFS had already endorsed as early as December 2013, when the agency published a federal notice regarding longline limits for bigeye tuna for the years 2014-2017 and specifically excluded all U.S. territories from the limits.

While NMFS denied part of Tri Marine's petition, leaving its fleet to pursue tuna in regions more distant than those it had traditionally fished for the rest of the year, the agency did agree to consider Tri Marine's request that it exempt from the fishing limit on the high seas and in U.S. territorial waters "any U.S. flag purse seine vessel which, pursuant to contract or declaration of intent, delivers or will deliver at least 50 percent of its catch to tuna processing facilities based in American Samoa." On October 23, the agency

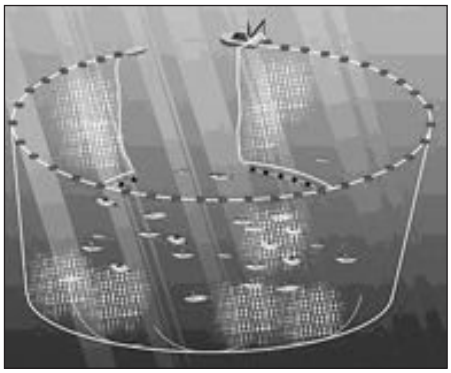


IMAGE: TRI MARINE

Purse seine fishing vessels use long nets with drawstrings to encircle and harvest fish.

published an advance notice of proposed rulemaking (ANPR) in the *Federal Register*, stating that it had determined that the limit "is expected to have substantial adverse economic impacts on U.S purse seine fishing businesses … and also that adverse impacts in terms of income and employment could occur in business sectors with … links to the producers."

"However," the notice continued, "to sufficiently assess whether such impacts, or other circumstances, warrant the regulatory action requested by the petition would require additional information that is not readily available to NMFS, as well as sufficient time to examine such information."

Furthermore, if the limit for 2015 "is found to impact American Samoa's fish processing facilities and its economy in the manner alleged in the petition, NMFS would need to determine whether the requested action is appropriate to address the problem and, further, whether it can be implemented consistent with U.S obligations under the [WCPFC] Convention."

Or, as Michael Tosatto, head of the Pacific Islands Regional Office of NMFS, explained in a statement to *Environment Hawai'i,* "The petition for rule-making first asserted that an economic impact was the basis for the petitioned action…. [W]e did not have enough information to determine whether the adverse impact complained of would jeopardize the ability of canneries in American Samoa to compete. The petition then asked for a specific action as relief. We also explained that we did not have sufficient information to determine that the requested relief was appropriate to address the adverse impact complained of (if it exists) and whether such relief could be implemented consistent with U.S obligations under the [WCPFC] Convention and other applicable laws."

"But," he continued, "in the ANPR, we are seeking information on both of these issues — the asserted economic impacts on vessels and shoreside processing in American Samoa and potential relief given our WCPFC obligations overall and specifically with regard to a participating territory."

ELAPS

The Effort Limit Area for Purse Seine (ELAPS) — the subject of Tri Marine's complaint — is part of a series of measures adopted by the Western and Central Pacific Fisheries Commission to regulate the catch of tunas in the region under the commission's jurisdiction. The United States, as a member of the commission, is legally bound to abide by the commission's conservation measures. ELAPS limits the number of days that U.S-flagged purse seiners may fish in the open seas and the U.S exclusive economic zone (EEZ) to 1,828 fishing days in 2015 — a limit that was reached in June.

U.S purse seiners may continue to fish in the EEZs of other nations, but to do so, they must pay substantial fees under terms set in the U.S. Tuna Treaty. In addition, some of those nations have severely restricted either the areas in which purse

seiners may fish or the number of effort days for purse seiners.

One of the most significant restrictions is the closure by Kiribati of almost all the waters around the Phoenix islands, due north of American Samoa. Kiribati, which is composed of three discontinuous archipelagos (Gilbert, Line, and Phoenix islands), is small in land mass. Its EEZ, however, is one of the largest in the South Pacific, covering an area of about 1.4 million square miles. Although the Phoenix Islands Protected Area was established in 2008, fishing was prohibited in just 3 percent of the waters. Last January, however, the president of Kiribati, Anote Tong, banned all fishing in the area.

In addition, Kiribati reduced the number of days of fishing allowed to the U.S. purse seine fleet in waters that remain open. In 2014, Tri Marine stated in its petition, Kiribati had allowed the fleet 4,313 fishing days. This year, that was cut to 300 – a reduction of roughly 93 percent.

According to Tracey Chikami, whose family owns the vessel *Western Pacific*, in recent years, Kiribati had accounted "for almost 45 percent of the U.S fleet's fishing effort."

One Flag, Two Fleets

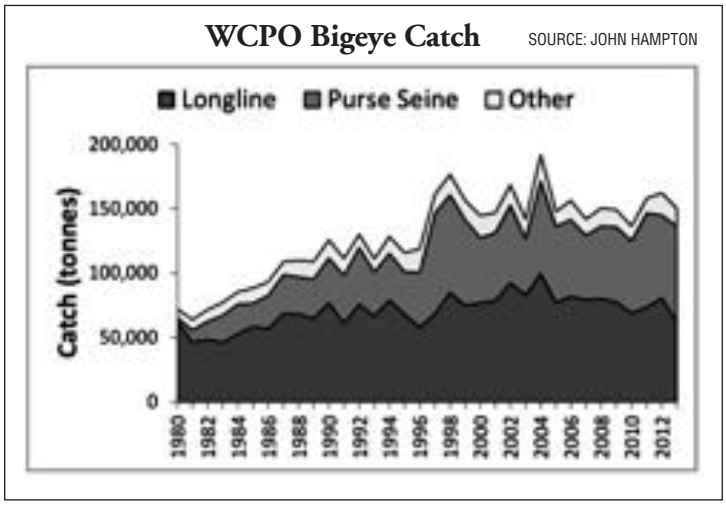
Comments on Tri Marine's petition were either strongly favorable – from representatives of the American Samoan government and the Department of Interior's Office of Insular Affairs, from people who worked at the company's cannery, from those who provided fuel and services to vessels visiting the port, from StarKist, and from a number of captains of purse seine vessels that supply the two canneries.

Two environmental groups were opposed. Amanda Nickson for the Pew Charitable Trusts noted that overfishing on bigeye tuna, a bycatch of purse-seining, continued to occur, that the number of purse-seine fishing days has increased 18 percent over the last 10 years, and that there was no way to monitor compliance with the exemption that Tri Marine was seeking. Catherine Kilduff, for the Center for Biological Diversity, pointed out that "creating exemptions from catch limits undermines conservation of bigeye tuna." In addition, she argued, NMFS had no legal basis to allow such an exemption, which would "allow essentially unlimited purse seine fishing on the high seas for any U.S-flagged vessel" promising to deliver half its catch to American Samoa.

The most heated opposition, however, came from J. Douglas Hines of South Pacific Tuna Corporation and Bumble Bee's Chris Lischewski.

Purse Seiners, Longliners Share Blame For Overfishing of Western Pacific Bigeye

So which fishery has a greater impact on the overfished bigeye tuna stock in the Western and Central Pacific, the longline or the purse seine? The longline fleet, which targets adult bigeye, removes the most reproductive fish from the population, while the purse seine fleet, which primarily targets skipjack, incidentally catches large numbers of juvenile bigeye, limiting the stock's reproductive capability even further.



According to the most recent Western and Central Pacific bigeye stock assessments by the Secretariat of the Pacific Community's (SPC) Oceanic Fisheries Programme, the longliners had the greater impact early on, but have been matched in the past few years by purse seiners as the number and size of vessels have grown and the number of fish aggregating devices (FADs) they fish on has exploded.

It's been estimated that 90 percent of the bigeye netted by purse seiners in the region has been caught by vessels setting on FADs, be they manmade or natural (i.e., whales). In 2011, the Western and Central Pacific Fisheries Commission's (WCPFC) Scientific Committee concluded that overfishing and the increase in juvenile bigeye catches have considerably reduced the bigeye stock's potential yield, and that maximum sustainable yield levels would increase if the mortality of juvenile bigeye was reduced. Since then, however, FAD fishing has only increased.

Last year, purse seine vessels set on FADs in the Western and Central Pacific 15,829 times, "a 3 percent increase on the 2010-2012 average sets baseline," according to a paper the SPC submitted to WCPFC last month.

— T.D.

Lischewski claimed the relief sought by Tri Marine was "designed to provide an economic benefit to our vertically integrated competitors … by lowering their production cost. Because U.S. purse seine vessels delivering to those processing facilities, including the vessels owned by our competitors, would not be required to purchase fishing days, the cost to their vessels harvesting tuna would be significantly lower…. Tuna processors in American Samoa are already exempt from local taxes, receive federal tax credits (Sec. 30A) and pay a very low minimum wage (currently $4.76). Providing them with an opportunity to avoid purchasing fishing days or paying less for raw material would only harm Bumble Bee and other tuna processors … that have made major investment in U.S. facilities." (Tri Marine's chief operating officer, Joe Hamby, has stated that Tri Marine is not eligible for tax relief under Section 30A of the tax code, which grants credit for certain investments made in American Samoa.)

Hines weighed in no fewer than four times over the course of the comment period for the petition, stating that he was representing 22 of the 37 U.S.-flagged purse seiners. By the time he made his last comment, on August 14 — three days before the comment period closed — Hines had backed off somewhat from the "strong opposition" he had initially expressed. "After consultation with industry and interested parties," he wrote, "we have received clarification on a number of our pending issues … raised in our initial comment letter."

He was still bothered by the fact that the petition would grant "a commercial advantage to one sector of the industry which would be a clear violation of … the Mag-

nuson Stevens Act," which governs marine fishing by U.S.-flagged vessels.

In responding to Hines, Curto recapped some of the history of the purse-seine fleet in the United States. "The vessels which Mr. Hines claims to represent have nothing to do with the American Samoa tuna purse seine fishery," he wrote. "They belong to another fishery, one that is based on transshipment and supplying their catch to markets other than American Samoa markets that compete directly with American Samoa's tuna fishery and industry."

In 2001, he wrote, he and his partners purchased eight U.S.-flagged purse seiners. By 2006, as a result of low prices and low-cost competitors, the fleet was at its low point, with no more than 13 U.S. vessels active in the Western and Central Pacific.

"In 2007 … we became aware of an initiative by U.S. and Taiwanese interests to build a large number of tuna purse seiners in Taiwan for operation in the Western and Central Pacific under the U.S. [Tuna] Treaty. … At first Tri Marine was publicly against this planned expansion of the tuna purse seine fleet as we didn't see the need for more fishing capacity … and we didn't think that the U.S. Treaty needed more boats for its survival.

"... My view then and still today is that the underlying economic stimulus and financing for this project came from the two Taiwanese shipyards that built these new boats. Those shipyards needed U.S. citizens to own at least 50 percent of these new boats. … Bumble Bee and Chicken of the Sea, as companies, did not qualify as they were and still are majority foreign owned. Instead, certain executives and employees of Bumble Bee and other U.S. citizens joined together to fulfill the U.S. flag citizenship requirements for these boats. … Their model is based on catching as much fish as possible without being tied to a particular processing plant. … Instead of producing canned tuna from whole round fish, they have highly automated factories that use frozen, cooked, and cleaned tuna loins as the raw material."

Curto concluded by asking that NMFS "understand that there are two different U.S. fisheries operating in the Western and Central Pacific under the same U.S. treaty."

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Violations

A closer look at the U.S.-flagged purse seiners currently holding a license to

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Treaty Sets Terms for U.S. Purse Seiners

Since 1987, the United States has had a treaty arrangement with 15 small South Pacific island states plus New Zealand and Australia. Every year, American taxpayers pony up a certain base amount to give the U.S. purse seiners the right to fish in the island states' EEZs, while the purse seiners themselves pay an additional sum for each day they fish in those waters.

Over the last couple of years, renewal of the treaty has been fraught with difficulties over terms of fishing rights and agreement on a long-term arrangement has proved to be elusive. Only last August did NMFS hammer out terms allowing the U.S.-flagged South Pacific purse seiners to fish through 2016.

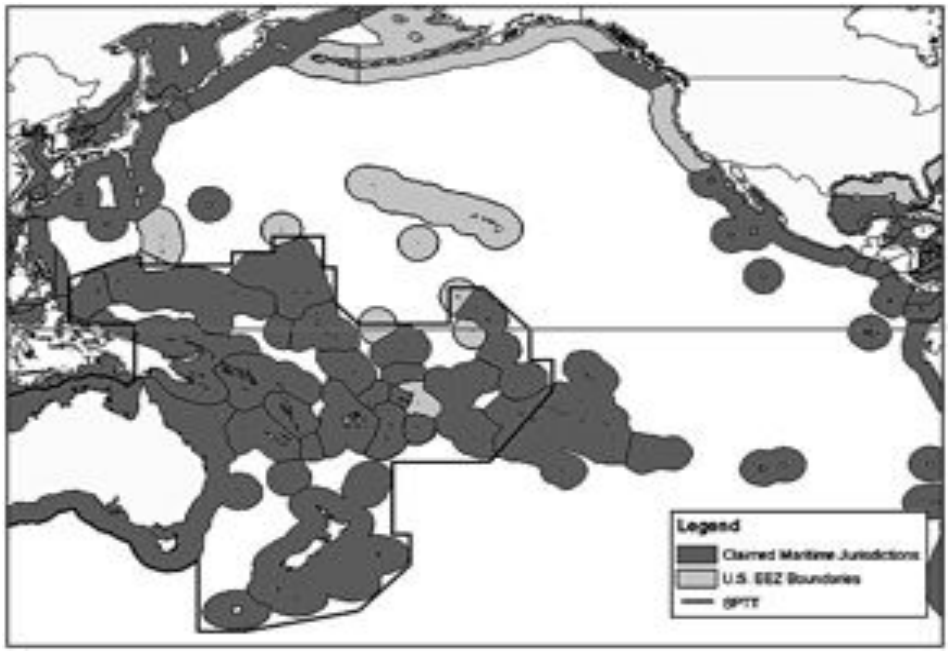
According to a press release from the Parties to the Nauru Agreement — a consortium consisting of Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu — the U.S. government will provide subsidy payments totaling $21 million as the cost of entry into the area, which, divided among the participating states, comes to $680,397 apiece. In addition, each vessel will pay $12,600 per fishing day in the EEZ waters — which is expected to bring in another $68,271,350 to the island states. In 2015, that fee was $9,380.

By law, no more than 40 purse seiners can participate in the U.S.-flagged South Pacific fleet. At present, the number of active vessels stands at 38. Ten purse seiners are affiliated with Tri Marine and are owned by Cape Fisheries Holdings, majority-owned by Renato Curto and based in Bellevue, Washington. Tri Marine is a vertically integrated operation, not just catching the fish, but also processing it and distributing it to wholesale markets. (Tri Marine also operates five purse seiners that fish entirely within the EEZ of the Solomon Islands and deliver the catch to a processor there, under a partnership agreement with that country's government.)

The South Pacific Tuna Corporation has 14 purse seiners in its fleet. Although the SPTC's chief operating officer is Douglas Hines, who was once closely affiliated with Bumble Bee brand tuna, SPTC has no direct ownership in canneries or processing facilities. Instead, it customarily offloads tuna in South Pacific ports closer to the fishing grounds. (As recently as 2009, the president and CEO of Bumble Bee, Christopher Lischewski, also held a 5 percent interest in 12 SPTC vessels.)

Four of the U.S. purse seiners are affiliated with Trans Global, a company that traces back to the Chen family of Taiwan. Two are owned by AACH Holdings, an enterprise of the Antonio Alvarez family. It has extensive fishery interests in South and Central America as well as the United States.

One purse seiner is tied to Dongwon, one of the largest tuna processing companies in the world (and owner of the StarKist cannery in Pago Pago). ***— P.T.***



MAP: NMFS

Map of area covered by the South Pacific Tuna Treaty.

Proposed Rule to Protect Marine Mammals Draws Critical Comments from All Quarters

For the last quarter century, consumers of canned tuna in the United States have been assured by most of the brands on the supermarket shelves that what they are eating was caught without harming dolphins.

The dolphin-safe label of the Department of Commerce certifies that the tuna was caught using methods that did not involve the deliberate netting or encircling of dolphins, which frequently associate with schools of tuna in the Eastern Pacific Ocean.

For more than seven years, however, a group of non-profit organizations has been urging the National Marine Fisheries Service to broaden protections for marine mammals taken in the course of fishing for tuna.

In 2008, two of these groups – the Center for Biological Diversity and Turtle Island Restoration Network – petitioned the Departments of Commerce and Treasury to "enforce its non-discretionary duty under the Marine Mammal Protection Act" (MMPA).

That act requires the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." In addition, the Secretary of Commerce is required to collect "reasonable proof" from fish-exporting nations of the effects of their fishing practices on marine mammals before those nations are allowed to sell products to the United States. If those effects exceed what is allowed under U.S. standards, the fish may not be imported.

Although the petition targeted the import of swordfish caught using methods that harmed marine mammals, NMFS "decided that the proposed rule would be broader in scope than the 2008 petition and is not limited in application to swordfish fisheries." On April 30, 2010, it published an advance notice of proposed rulemaking to implement the MMPA.

More than five years passed before NMFS published its proposed rule — on August 11, 2015.

At the Western Pacific Fishery Management Council's October meeting in American Samoa, NMFS Pacific Islands

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fish in the Western Pacific does show deep divisions.

Slightly more than half the fleet (20 vessels) was built after 2000. This category includes all of the South Pacific Tuna Corporation purse seiners and the four vessels associated with the Taiwanese company Trans Global Products. Just one of Tri Marine's fleet is in this category: the *Cape Ann*, built in 2015. Seventeen were built prior to 1990.

The vessels also fall into two categories when it comes to compliance with U.S. and international laws.

A review by *Environment Hawai'i* of enforcement actions against the tuna fleet found those belonging to the South Pacific Tuna Corporation were cited many more times than those associated with any other operator:

• In 2012, five SPTC vessels were found to be in violation of U.S. Coast Guard manning requirements by employing unlicensed foreign personnel to fill the roles of chief mate and chief engineer.

• Just this past August, a federal appeals court upheld an administrative law judge's finding that five SPTC vessels had engaged in a variety of prohibited actions, including five counts of setting their nets on whales (in violation of the Marine Mammal Protection Act), 10 counts of setting on or near a fish-aggregating device (FAD) during the 2009 FAD closure period, and two counts of deploying FADs during the closure. The court upheld a combined penalty assessment of $953,053.94 against the company.

• The *Ocean Conquest* has been charged with an MMPA violation, with a proposed fine of $11,000. That penalty is under review by the administrator of the National Oceanic and Atmospheric Administration.

• The *Pacific Ranger* has been charged with five counts of MMPA violations, with a proposed fine of $149,250. After an administrative hearing, the fine was reduced $127,000. That decision is on appeal to the U.S. District Court.

• The *Ocean Challenger* has agreed to pay a compromise penalty of $123,750 for two counts of setting on a FAD during a FAD closure.

• The *Ocean Warrior* agreed to a compromise fine of $202,000 for two counts on setting on FADS during the FAD closure.

• In 2014, the SPTC vessel *Sea Bounty* paid $125,000 to the Marshall Islands Marine Resources Authority to settle allegations that it was catching and finning silky sharks inside Majuro lagoon. The same vessel was also reported to have been setting on a whale shark inside Marshall Islands waters. (In 2013, acknowledging that silky sharks had become seriously depleted, the WCPFC adopted a conservation measure that prohibited the retention, transshipment, storing, or landing of any silky shark caught in its waters. The prohibition took effect on July 1, 2014.)

Vessels associated with Trans Global Products make up the fleet with the second highest number of violations:

• The *American Eagle* was fined $59,400 for 6 counts of violating the MMPA by setting its net on whales.

• The *American Triumph* was fined $14,100 for harassing an observer and $72,669.75 for FAD violations. This past August, the U.S. District Court in the District of Columbia upheld an administrative law judge's finding that affirmed a fine of $562,068.27 for additional FAD violations dating back to 2009

• The *American Victory* paid $111,351.10 to settle charges that it violated the MMPA by setting on a whale and set on or serviced a FAD during the FAD closure period.

AACH Holdings has paid $153,000 in fines for two MMPA violations and two FAD violations by the *Daniela*. In September, an administrative law judge assessed a fine of $21,000 for three additional MMPA violations. AACH's other purse seiner, the *Isabella*, was fined $110,000 for fishing in a closed area and a total of $58,000 for eight separate counts of MMPA violations.

Just one infraction was associated with Tri Marine: earlier this year, the company agreed to pay $1.05 million in fines related to an oil spill that occurred in Pago Pago harbor in October 2014. In that incident, the *Capt. Vincent Gann*, while maneuvering to shift moorings, hit two other vessels. As a result, the *Capt. Vincent Gann* suffered a large gash in its hull and at least 35 barrels – about 500 gallons – of oil spilled from the bulb in the vessel's bow, where it had been illegally stored forward of thecollision bulkhead.

— Patricia Tummons

Regional Office administrator Mike Tosatto elucidated the proposed rule's potentially significant economic effects and stressed the need to craft a final rule that tempers them.

"No other country in the world bans purse setting on whales except the United States," he said. "Japan does not ban setting on whales. If you read this rule strictly, they'd have to do that within five years or all imports would be banned. … Billions and billions of dollars of seafood from Japan."

He continued that while leveling the playing field is a laudable goal, the "devil is in the details."

"Don't make it a paperwork exercise. Don't level the playing field with a bunch of paper," he said, adding that he opposed a ban of all Japanese imports.

"We need to make sure this isn't an exercise so we feel better," he said.

Spirit vs. Letter

Including the individuals who signed on to petitions circulated by environmental groups, tens of thousands of people commented on the rule by the time the comment period closed on November 9. The actual number of discrete comments was far smaller — around five dozen.

Many of those representing conservation and environmental organizations noted that, in the words of Leigh Henry and William Fox Jr., of WWF-US, "Fisheries bycatch is the greatest singular threat to marine mammals across the globe – it is responsible for more than 600,000 deaths each year."

In their comments, eight other conservation groups – Animal Welfare Institute, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Natural Resources Defense Council, Humane Society of the United States, Turtle Island Restoration Network, and Whale and Dolphin Conservation – listed a number of species that have either gone extinct or have been threatened by fishing, including the North Atlantic right whale, the "critically imperiled vaquita in the Gulf of California, dusky and other dolphins off South American, New Zealand sea lions, and false killer whales on the high seas outside Hawai'i."

Most conservation groups expressed concern that the proposed rules were vague in giving NMFS the ability to determine whether another nation's standards were of comparable effectiveness to those of the United States. They were generally concerned over the exemptions for processed fish food (for example, fish sticks, fish oil, and fish cake) and they expressed disappointment with the five-year grace period that the proposed rules would grant to exporting countries before they would have to show compliance with standards comparable to those in the United States.

The Campaign for Eco-Safe Tuna, whose chief backers include the companies that make up Mexico's tuna fleet and the fishing ministries of many Latin American countries, objected to the "comparability" standard as being far less stringent than the standards that have been imposed in the Eastern Tropical Pacific in connection with dolphin-safe tuna. It, along with the environmental organizations, also objected to a loophole allowing so-called intermediaries – countries that process fish and export fish products – to avoid full compliance with the proposed standards.

In contrast to the environmental groups, which criticized the proposed rules for their laxity, comments from representatives of the fishing industry and fish processors found the rules far too stringent.

Rod Moore, executive director of the West Coast Seafood Processors Association, raised the prospect of retaliatory bans on U.S. exports from countries that are found to be non-compliant with U.S. standards to protect marine mammals. "Is anyone in NMFS paying attention to the real world or are you all busy navel-gazing there in Silver Spring?" Moore wrote, referring to the Maryland suburb of Washington where NMFS had its headquarters.

Ryan Steen, an attorney representing the Hawai'i Longline Association, was more circumspect in his comments, noting that the HLA "supports NMFS's goal to hold foreign countries exporting fish and fish products to the United States accountable to the robust standards that have been applied to domestic commercial fisheries for decades." But Steen went on to point out that the regulations would be cumbersome and impose "a significant administrative burden" on NMFS. "Absent additional funding and staffing, the proposed rule threatens to come at the expense of further delaying the processes under which domestic fisheries are permitted and authorized."

> *"Is anyone in NMFS paying attention to the real world or are you all busy navel-gazing there in Silver Spring?"*
> ***— Rod Moore, West Coast Seafood Processors Association***

Mark J. Robertson, representing the campaign in Washington, D.C., pointed out that a study published last year in the journal *Marine Policy* found that "illegal tuna fishing in the Indian and Pacific Oceans is facilitated by the lack of seafood traceability when supplies are consolidated during trans-shipment at sea. … Of the 85 percent of tuna imported by Thai processors, only 30 percent meets the relatively strict traceability requirements of the European Union. … Much of the untraceable balance is what finds its way into the comparatively lax U.S. market."

Against that, Robertson noted, "tuna fishing in the [Eastern Tropical Pacific] is strictly monitored through the comprehensive, legally binding multilateral tracking and verification system established under the [Agreement on International Dolphin Conservation Program], a treaty to which the United States is signatory." He compared the observer program in the Eastern Pacific, which has a high standard for observer training to that in the Western and Central Pacific, where "the observers are, for the most part, merely elements of programs of individual island nations, who report data back only to those nations."

"There are holes in these proposed regulations big enough to drive a purse seiner through," Robertson wrote, "and in our judgment, NMFS has taken excessive license with the concept of comparability."

In sum, however, Steen wrote, "HLA supports the goal of the proposed rule to level the playing field between foreign fisheries and U.S. commercial fisheries."

Kitty Simonds, writing on behalf of the Western Pacific Fishery Management Council, was harsher, criticizing the MMPA itself. "The Council has found that the implementation of these provisions [to protect marine mammals] is resource intensive and struggles from limited resources and data, yet has the potential to result in increased restrictions on U.S. fisheries while providing little conservation benefit to the marine mammal stocks," she wrote.

"Additionally," she continued, "the overall benefits to marine mammal populations … are likely to be limited given that the regulations will not affect foreign fisheries not exporting products to the U.S."

— P.T.

Lax Safety Requirements for Vessels Making Up Purse Seine Fleet in Pacific

A number of vessels in this fleet have subpar safety and pollution records. During safety inspections, crews have failed emergency drills due to, in part, unqualified persons in key positions and language barriers due to a mixed, nearly entirely foreign crew."

With those harsh words, the U.S. Coast Guard's judge advocate general, Rear Admiral Steven Poulin, described the vessels that make up the U.S.-flagged South Pacific purse seine fleet in his report earlier this year to the American Bar Association, meeting in Chicago.

Nor did Poulin hold back when ascribing blame for this situation.

"Congress has authorized these vessels certain manning exemptions, permitting foreign persons to fill the chief engineer and mate positions, which are typically required to be filled by U.S. citizens," he said. "In addition, the latest Coast Guard Authorization Act removed requirements for annual safety exams and mandated U.S. port calls for vessels opting to utilize the manning waiver. Given this and other waivers, the master may be the only U.S. citizen aboard many of these vessels.

"Despite these generous allowances, these vessels are often found in violation of the manning waivers with a 'paper Captain' (where the person actually in command of the vessel is a foreign citizen). This frustrating issue is exacerbated by minimal penalty amounts, which have proven insufficient to deter this behavior."

Enforcement of even these lax requirements, Poulin noted, was difficult: "manning, safety, and crew treatment concerns throughout the fleet continue to be an enforcement challenge due to constrained resources, vast operating areas, and broad Congressionally authorized manning waivers."

The various associations and corporations having an interest in the purse seine fleet have spent hundreds of thousands of dollars lobbying Congress in recent years.

For example, in 2010, the American Tunaboat Association paid Pike Associates $120,000 for lobbying on the Coast Guard Authorization Act – specifically, "officer requirements for distant water tuna vessels" – and on two other bills relating to international fisheries.

The ATA's spending on lobbyists pales alongside that of the South Pacific Tuna Corporation, which controls 14 of the 38 active vessels in the so-called distant water tuna fleet (DWTF). From 2008 to the first quarter of 2015, SPTC spent $235,000 on lobbying expenses – most of it in relation, again, to "manning requirements for U.S. tuna purse seine fishing vessels," a recurring provision in the Coast Guard authorization bills. (The figures come from the website "OpenSecrets," which compiles reports filed by lobbyists with the U.S. Senate.)

Both ATA and SPTC chose Jeffrey Pike as their lobbyist. Pike, who was chief of staff for the House Merchant Marine and Fisheries Committee from 1993 to 1994, began lobbying for the firm of Sher & Blackwell in 1998. In 2006, he briefly advocated for the US Tuna Foundation. In 2009, he left Sher & Blackwell to form his own firm, Pike Associates.

The Majestic Blue

Possibly the perfect storm of all the exemptions granted to the U.S. purse seine fleet occurred in June 2010, with the sinking of the *Majestic Blue*, one of the U.S.-flagged tuna purse seiners enjoying all the privileges afforded by the U.S. Tuna Treaty.

Writer Kalee Thompson has described the events leading up to the sinking for the online publication "matter" (medium.com/matter) in her article "Mutiny on the Majestic Blue." Based in large part on the U.S. Coast Guard's investigation into the sinking and on court records and interviews, what emerges is a horrifying picture of a captain in name only, unable to communicate with his crew and virtually held hostage by a Korean fishing master hired by Dongwon, the fifth-largest fishing conglomerate in the world and owner of StarKist, among many other holdings.

To be included in the U.S. purse seine fleet in the South Pacific, a vessel must be majority-owned by U.S. citizens. In the case of the *Majestic Blue* and *Pacific Breeze*, the other Dongwon-affiliated purse seiner in the U.S. fleet, the nominal owner was a Delaware limited liability company, whose principals were two nieces of Dongwon chairman J.C. Kim.

PHOTO: USCG

The *Majestic Blue* in Guam.

The *Pacific Breeze* continues to be included in the U.S. purse seine fleet.

According to its website, mbpbab.com, "Our company is 100% owned by United States Citizens. … Our company is opened [sic] minded relative to fishery related issues and welcome [sic] any suggestions one may have."

The Coast Guard investigated the sinking, releasing its report with several recommendations in 2013.

The first was to require indicator lights on the bridge for each watertight door belowdecks. Captain J.C. Burton, director of inspections and compliance, rejected this, noting that commercial fishing vessels are not required to have watertight doors, except in special cases.

Second, because the crew of the *Majestic Blue* was made up of so many different nationalities, the captain's instructions could not be understood. The investigation recommended that "all emergency instructions should be in a common language of the crew."

Burton disagreed. Coast Guard regulations already required crews to undergo emergency drills at least once a month. "While having those instructions in a common language of the crew, if there is one, or in the various languages of the crew would help to ensure their understanding, I believe the issue can be effectively addressed by ensuring compliance with the existing requirements for instruction, drills, and safety orientation."

The investigators recommended that the Coast Guard change its regulations so that large fishing vessels would have to have at least 75 percent of the crew throughout the vessel understand any order spoken by the officers – a requirement for most other vessels licensed by the Coast Guard.

Burton did not agree. "The exemption … is a direct implementation of an exemption granted by Congress. … As such, the Coast Guard cannot remove the exemption without a change to the federal statute enacted by Congress."

Recommendation four was that the Coast Guard "should seek legislative authority and additional resources to support a mandatory annual inspection for commercial fishing vessels to include a dry-dock examination."

Burton concurred with the intent of the recommendation and went on to note that the Coast Guard had submitted "Legislative Change Proposals (LCPs) for such authority numerous times" – always, however, without success.

At present, vessels in the tuna fleet need to undergo Coast Guard inspection (not including dry dock) just once every five years.

. ***— P.T.***

State Recommends Denial of Permit For Western Kapolei Drainage Outlet

A concrete drainage outlet in West Kapolei approved by government agencies more than two decades ago — but never built — is undergoing closer scrutiny as its developer seeks to obtain again all of the project's permits that have long since expired. Although the City and County of Honolulu has approved new Special Management Area and shoreline setback variance permits, the U.S. Army Corps of Engineers determined earlier this year that the project's application for a permit from that agency was incomplete. And in July, the project, which would serve as the main stormwater runoff outfall for the entire 2,700-acre drainage basin, hit another snag: The state Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL) chose not to support a Conservation District Use Permit. Rather than face rejection before the state Board of Land and Natural Resources, the developer, 'Aina Nui Corporation, withdrew its application.

OCCL staff says the company, an affiliate of the James Campbell Company, LLC, will likely reapply. But unless the application includes a thorough analysis of potential impacts to native Hawaiian cultural practices and of alternatives, the agency will likely stick to its recommendation that the Land Board deny the permit.

The drainage outlet was originally proposed by the Estate of James Campbell in the early 1990s. It received approval from Honolulu's Department of General Planning in 1993 and from the Land Board in 1994.

The 1,750-foot-long drainage canal was intended, first and foremost, to serve the Kapolei Business-Industrial Park, a planned 931-acre extension of the James Campbell Industrial Park. The expansion was expected to increase runoff in the area and exacerbate flooding in low-lying areas near the Kalaeloa Boulevard/Malakole Road intersection and near the northwest corner of the Chevron USA refinery. The outlet was designed to help alleviate that flooding and also to serve future developments within the drainage basin that includes the Awanui Gulch, Palailai Gulch, and Makaiwa Gulch watersheds.

'Aina Nui proposes to dredge the outlet through a fossil reef located on state unencumbered land, but it needs a CDUP before it can obtain an easement from the DLNR. Once the outlet and the mauka canal that feeds into it are complete, the company plans to dedicate them both to the city.

In its 2011 environmental assessment (EA) for the outlet, the company states that the project "is an essential component to continuing the successful expansion of Kapolei as O'ahu's second urban center." The outlet would serve several planned developments, including Makaiwa Hills, Kapolei West, Kapolei Harborside, Kapolei Commons, West Kalaeloa Business Park, and the Kapolei Maritime Industrial project, the EA states.

While acknowledging the need for the project, OCCL staff stated in its July 25 submittal to the Land Board that it was concerned about the outlet's long-term effects on the marine environment.

"The drainage canal traverses an industrial area, including an oil refinery, and would drain a major urban watershed. The [EA] for the project provides marine and archaeological assessments, including storm water flow modeling and marine plume modeling [but] concludes that the project will have No Significant Impact," the agency wrote. The OCCL continued that it doubted whether the project's 1991 and 2011 environmental review documents provided "adequate information, disclosure, and mitigation measures from which to conclude that the project is consistent with Conservation District objectives to protect and conserve the [state's] natural and cultural resources. … The focused discharge of runoff into nearshore waters will result in a high potential for pollutants from the watershed to be introduced into the marine environment."

The OCCL also seemed unimpressed with 'Aina Nui's investigation into alternative stormwater control options.

"[T]he original FEIS from 1991 devotes a paltry two pages to a discussion of alternatives," the submittal stated.

Those alternatives include diverting runoff into Kalaeloa Barbers Point Harbor, diverting it into an existing drainage channel near the Barbers Point Naval Air Station, or retaining runoff in retention basins.

The 2011 EA dismissed the harbor alternative, arguing that the velocity of the runoff might affect the maneuvering of vessels or dislodge ships from their moorings. Discharging into the existing drainage channel east of the project area was also deemed infeasible because it's too small to take more runoff from the West Kapolei drainage area. That channel already serves a separate 2,500-acre drainage basin and can't be widened or deepened because of surrounding development and the area's hydrology, the EA stated. Finally, with regard to retention basins, the EA found that they are impractical because they take up too much space.

Because the proposed drainage outlet could significantly affect the Conservation District, the OCCL stated that there should have been a more thorough investigation of alternatives.

With regard to the outlet's potential impact on native Hawaiian cultural practices, the OCCL wrote that 'Aina Nui had included only a short discussion on the subject in its CDUP application and did not appear to have interviewed any native Hawaiian cultural practitioners.

MAP: SSFM

"Because this is a major project with long-term effects, it would be important to consider whether native Hawaiian interests were being protected. Unfortunately, the Ka Pa'akai analysis appears to be superficial," the OCCL stated. (The "Ka Pa'akai analysis" refers to the Hawai'i Supreme Court case *Ka Pa'akai O Ka 'Aina vs. Land Use Commission*, which laid out the framework by which government agencies must identify the extent to which traditional and customary native Hawaiian practices are affected by a proposed action and also identify actions necessary to protect native Hawaiian rights.)

— T.D.

NHLC: It Would Be 'Illogical, Unfair' To Bar Substitution in Kalo'i Gulch Case

It seems the state Board of Land and Natural Resources may be the one to decide whether the contested case hearing over the Conservation District Use Permit (CDUP) for the Kalo'i Gulch Drainage Improvements at One'ula Beach Park will continue with Kua'aina Ulu 'Auamo (KUA) as the petitioner in place of native Hawaiian limu expert Henry Chang Wo, Jr., who passed away in September.

KUA's and Chang Wo's attorneys with the Native Hawaiian Legal Corporation filed a motion with the Land Board on September 17 asking for the substitution, as well as for an expedited decision on whether or not the project needed a supplemental environmental impact statement (SEIS).

On October 23, attorneys for the permit applicants—Haseko ('Ewa), Inc., the University of Hawai'i, the state Department of Hawaiian Home Lands, and the City and County of Honolulu's Department of Planning and Permitting — argued that the 1st Circuit Court, not the Land Board, had the authority to decide whether KUA can take Chang Wo's place in the case, which was appealed to the court in 2014. They also argued that KUA, a non-profit group of native Hawaiian cultural practitioners, lacked any special interest or right that would be directly or immediately affected by the CDUP. If issued, the permit would allow the lowering of a sand berm at One'ula Beach Park to allow stormwater runoff to enter the ocean where Chang Wo collected limu and taught community members how to maintain the beds. Such an interest, the applicants' attorneys argued to the Land Board, is required to achieve standing in a contested case.

To allow KUA to take Chang Wo's place as petitioner "would be to open the back door to KUA's participation where it would not have been allowed entry through the front door," their memo in opposition states.

In their October 27 response, NHLC attorneys David Kimo Frankel and Liula Nakama pointed out that their motion was filed under the Land Board's administrative rules, not a Circuit Court rule. And under the board rules, it has the right to allow substitutions following the death of a party in a contested case. "And in fact, [1st Circuit] Judge [Rhonda] Nishimura expects nothing less, as she made clear in chambers," they wrote, referring to comments she made during an October 2 status conference.

The standard for such a substitution under the Land Board's rules is simply that good cause must be shown, Frankel and Nakama wrote.

"It would be illogical and unfair to interpret [the Land Board's substitution rule] to allow perpetual corporations and agencies to freely substitute and sell interests, but deny that ability to Native Hawaiians who live, breathe and die," they wrote, adding that the suggestion from the applicants' attorneys that the substitution motion was intended to circumvent the Land Board's contested case rules was insulting.

"There was no reason for KUA to intervene in the contested case hearing earlier because Uncle Henry was already doing so, and the BLNR's rules discourage redundant intervention. … The applicants are arguing that Native Hawaiian cultural practices enjoyed by generations of Hawaiians can be extinguished by the death of a single Hawaiian. The fact that Native Hawaiians use this area to gather limu and fish has never been in question," Frankel and Nakama wrote.

Not only should the Land Board authorize the substitution, they argued it should also immediately decide whether the applicants need to prepare an SEIS, which is an issue the 1st Circuit Court remanded to the board.

"The parties submitted arguments and proposed findings as to that issue seven months ago. [The board] can and should render its decision right away," they wrote.

A Surreply

In a November 4 filing, the applicants' attorneys agreed that Judge Nishimura "did indicate an inclination to have the board, rather than herself, render a decision on the motion to substitute." However, they took serious issue with the NHLC's statement that she had expressed an "inclination … to allow the substitution to take place." She did not say that, according to a declaration by Haseko attorney Yvonne Izu.

"It would impugn Judge Nishimura's integrity to suggest that she would express her inclination on a matter without having even reviewed the pleadings," the attorneys wrote.

They also disputed the NHLC's claim that they had insisted on scheduling a status conference so soon after Chang Wo's death. University of Hawai'i attorney Lisa Bail countered that it was Judge Nishimura who had requested the conference, not the applicants.

Their filing was not provided for under the Land Board's order on the NHLC's substitution motion, but the applicants' attorneys wrote that they had to comment on the NHLC's "misrepresentations," especially since the Land Board may make a decision on the motion without holding oral arguments.

They asked that the board either consider their arguments in their decision making or schedule oral arguments.

The Land Board had not issued any ruling by press time. — ***Teresa Dawson***

Environment Hawai'i, Inc.
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'Ahihi-Kina'u Kuleana Owners Get Water Line Permit Over DLNR Concerns

Despite opposition from the Chairperson Suzanne Case and from the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL), the Board of Land and Natural Resources approved a Conservation District Use Permit for a water line to an unimproved kuleana parcel adjacent to the 'Ahihi-Kina'u Natural Area Reserve (NAR) in South Maui.

By obtaining the CDUP, the value of the holding has increased for the 120-plus landowners with an interest in the kuleana lot, and they will likely be able to sell it for much more than the Maui County tax assessed value of $1,000. Selling the property would resolve a lawsuit initiated nearly 20 years ago when Betty Snowden realized she had a kuleana interest in lands now owned by Douglas Schatz, according to one of her attorneys. He added that under a settlement reached about a decade ago, Snowden and other kuleana landowners in the area there gave up their interest in some lots and agreed to sell the subject lot.

A court-appointed commissioner, Ray Wimberly, decided that water should be made available to facilitate the sale. Both the lot and the right-of-way across which the water line will cross lie within the Conservation District.

In evaluating the landowners' request for the permit, the OCCL found two major issues: 1) it was unclear who owned the land across which the water line would run – the county or the state; and 2) there was a concern that the permit request was part of a larger plan to develop a residence on the lot.

OCCL administrator Sam Lemmo told the Land Board at its October 23 meeting that although the landowners had an easement from the county to install the line alongside the Makena-Keone'o'io Road right-of-way, a memorandum of agreement between the county and the state over joint maintenance of the road seemed to suggest that the state might hold jurisdiction — and, possibly, ownership — of the shoulder of the road, which is where the line would run. And if the state did indeed own the shoulder, that would mean it was within the NAR and that the landowners would need to get approval from the Natural Area Reserve System Commission.

Lemmo added that because the water line will be providing infrastructure to a vacant Conservation District lot within the resource subzone, he had some concerns about "whether this constitutes parceling … of a larger project."

"Theoretically, I can't do a full-blown analysis of the project when I see only one component. My recommendation is to not accept the proposal," he said.

PHOTO: DLNR

An existing water line along the shoulder of the road that cuts through the 'Ahihi-Kina'u Natural Area Reserve.

Land Board member Chris Yuen, a former Hawai'i County Planning Director, didn't seem concerned that the state might own the easement area.

"My take has always been these miscellaneous roads are county [owned] by operation of law," he said.

Yuen was also persuaded by attorneys in the court case who testified that the landowners have no future plans beyond installing the water line and selling the property.

"The whole project is the water line," said attorney Andy Wilson. Wilson noted that the landowners planned to install the line alongside Schatz's water line.

"We're thinking, let's give the Hawaiians the same … eligibility of water that's existing down there," Wilson said.

After an executive session, Yuen made a motion, seconded by Ulalia Woodside, to grant the CDUP.

"At the end of the day, this is a request for a two-inch diameter plastic pipe to lay along another plastic pipe … to service this vacant parcel," he said. He added that while he appreciated the OCCL flagging is this as something possibly part of a larger project, "there is truly not a larger project at this point."

Before the final vote, Land Board chair Suzanne Case said she had to respectfully disagree with Yuen and thought the CDUP did, indeed, pose a segmentation issue.

Approving the water pipeline is "a step along the way" to building a house in a very sensitive area, she said.

"I'm very, very sympathetic to the applicants' long litigation and desire to create value. That is not our job. Our job is not to create value for a private parcel," she said.

In the end, the board approved the permit, with Case being the only member to vote in opposition. ***—T.D.***