

Environment



Hawai'i

a monthly newsletter

Laws and Orders

With literally thousands of bills on the table each legislative session, tracking them is a Herculean task. Now that the dust has settled, we take a look at a few of them that, for better or worse, made it into law.

Heading the list is one that establishes a water security advisory panel – although just who or what it is to advise remains a mystery.

And then there are the orders – namely, the ones from the Public Utilities Commission that knock the Green Energy Market Securitization program (GEMS) back on its keister.

Finally, we discuss the outcome of a controversial attempt by the state Water Commission staff to fine taro farmers in West Maui for an old water diversion, as well as developments in the ongoing efforts by those same farmers and others to restore streams there.

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Wailua Reservoir on Kaua'i.

PHOTO: DLNR

Legislature Sets Up New Panels To Advise on Water, Game, USTs

The 2016 session of the Hawai'i Legislature will not go down as one notable for its environmental achievements. On the whole, few bills having a significant impact on the environment made it through to the finish line.

Still, several measures that did become law could make environmental protection more difficult or divert resources from agencies charged with protecting natural resources that are already strapped for funds.



Water Security Advisory Group

House Bill 2040 (Act 172) establishes a Water Security Advisory Group – ostensibly to advise the Department of Land and Natural Resources – with a sun-

set provision after two years. The purpose, the bill says, is to “enable public-private partnerships that increase water security by providing matching state funds for projects and programs that: (1) Increase the recharge of groundwater resources; (2) Encourage the reuse of water and reduce the use of potable water for landscaping irrigation; and (3) Improve the efficiency of potable and agricultural water use.” To that end, the measure appropriates \$750,000 for the current fiscal year to the Department of Land and Natural Resources.

The legislation is the result of an initiative that began three years ago under the auspices of the Hawai'i Community Foundation. In order to “develop a forward thinking and consensus-based strategy to increase water security for the Hawaiian Islands,” it stated,

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Hawai'i

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NEW AND NOTEWORTHY



PHOTO: NOAA

Spinner Dolphin

Spinner Dolphin Protection: Popular though the swim-with-dolphin tours in Hawai'i may be, they are believed by scientists to pose a threat to spinner dolphins themselves, disturbing their rest patterns and making them more vulnerable to predation by sharks.

More than 10 years ago, the National Marine Fisheries Service began a process of studying the behavior of animals subjected to such tours. Now, finally, it has published a draft rule that would prohibit approaches to spinners any closer than 50 yards, effective out to two nautical miles from shore (and banned altogether in the area between the islands of Lana'i, Maui, and Kaho'olawe).

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Commercial tour operators that offer swim-with-dolphin tours, in addition to individuals who swim or kayak from shore to engage with spinner dolphins, "have been interacting with the dolphins during times when these animals are at rest," NMFS says. "Scientific research has shown that the dolphins' behaviors have been affected by such human disturbances."

In addition to the swim-with-dolphin tours, NMFS also notes that "organized retreats centered on dolphin encounters, dolphin-assisted therapy, and dolphin-associated spiritual practices have flourished in certain areas, further increasing the intensity of dolphin-directed activities in near-shore areas and especially within essential daytime habitats."

Although the rule applies only to spinner dolphins, the dolphin tours often attempt to engage with other species of cetaceans as well, including bottlenose, spotted, and Risso's dolphins. Robin Baird of the Cascadia Research Collective, who has studied whales and dolphins in Hawaiian waters for nearly two decades, voiced his disappointment that NMFS' proposed rule dealt with only the one species. "I think that will only lead to increased interactions with other species as a result," he told *Environment Hawai'i*.

Yet more restrictions may be in the offing, according to the notice in the Federal Register of August 24, depending on comments received from the public from now through October 23. One possibility is mandatory time-area closure, lasting from 6 a.m. to 3 p.m. in areas that are essential resting habitat for the spinner dolphins. Public hearings will be held across the state in September.

Ann Garrett with the Protected Resources Division of NMFS' Pacific Island Regional Office, noted that the rule has been "under development

since 2005 and has always been about only Hawai'i spinner dolphins since its early scoping."

She said other species were not included "because they don't tend to receive the same level of attention, are not as easily accessible and are typically irregularly encountered. That said, all marine mammals are protected from take under the Marine Mammal Protection Act, and anyone engaged in disturbing, harassing or other forms of take of a marine mammal is in violation of the law and risks prosecution. The proposed rule does, however, put people on notice that we consider swimming with cetaceans likely to result in take."

Rapid 'Ohī'a Death Hearings: The state Department of Agriculture is holding public hearings on a proposed administrative rule that would generally prohibit the movement of 'ohī'a plants, plant parts, soil, and other known hosts of the fungus causing rapid 'ohī'a death (*Ceratocystis fimbriata*).

Under the rule, if in the future a treatment method is found that kills the fungus, the chief of the department's Plant Quarantine Branch can approve it and allow the intrastate movement of treated materials.

The schedule for hearings is:

Honolulu: August 31, 5 p.m., DOA conference room, 1851 Auiki Street;

Kahului: September 1, 5 pm, DOA conference Room, 635 Mua Street;

Lihue: September 2, 5 pm, DOA conference room, 4398A Pua Loke Street;

Kona: September 6, 5 pm, West Hawai'i Civic Center, 75-5044 Ane Keohokalole Highway;

Hilo: September 7, 5 pm, DOA Conference Room, 16E Lanikaula Street.

A copy of the proposed rule has been posted on the DOA website: <https://hdoa.hawaii.gov/wp-content/uploads/2013-01-4-72-Ohia-Proposed-Amendments-5-23-31rev.pdf>

'Aina Le'a Correction: In our August update on the proposed 'Aina Le'a development, we incorrectly stated that the Hawai'i County Planning Department had commented on a proposed draft supplemental environmental impact statement (SEIS) for the project. In fact, the county was commenting on a proposed preparation notice for the draft SEIS.

The SEIS prep notice still had not been published at press time.

Quote of the Month

"Uncle John and aunty Rose aren't whiners. What your staff has put them thorough is just wrong, legally, morally, and practically."

— **Kapua Sproat**

Efforts to Expand GEMS Loan Programs Shot Down by Consumer Advocate, PUC

GEMS — the state's Green Energy Market Securitization program — has a problem: It just can't figure out how to spend the \$144 million or so it has in the bank. But it keeps trying.

Although the law setting up this program was intended to help low-income utility customers and other economically disadvantaged sectors share in the benefits of renewable energy technology, the Hawai'i Green Infrastructure Authority (HGIA), which manages GEMS, attempted in July to expand the pool of potential beneficiaries with a proposal to fund energy-saving initiatives of large corporations, with a minimum loan amount of \$1 million. Among the possible recipients are the very utilities whose customers are paying interest and principal on the GEMS bonds in the first place.

The authority also proposed including energy storage systems (batteries, mostly) as a technology eligible for GEMS financing.

In addition, the HGIA launched in July an "open solicitation for financing arrangements." This invites "clean energy industry participants to propose transactions involving partnership" (sic) with the HGIA, particularly "transactions that utilize funds to further [HGIA's] high-impact, market-based strategy to deploy clean energy infrastructure financing that will expand access and affordability of clean energy."

All this activity came just days in advance of the HGIA lodging with the Public Utilities Commission (PUC) its report for the calendar quarter ending June 30, 2016. As of that date, just 12 loans, having a face value of \$385,453, had been issued, leaving a balance of \$144,661,025.67 in the GEMS fund.

Despite the HGIA's fervid efforts to push money out the door, the gatekeepers at the Public Utilities Commission have pushed back. In response to the two proposals made in late July to allow financing of energy storage systems and broaden the pool of loan recipients, the PUC has put the brakes on both, pending further justification.



Battery Loans Nixed

On July 22, the HGIA notified the PUC of the proposed change to its consumer loan product, which would have added energy storage equipment to the list of eligible technologies.

In explaining the need for this, the HGIA pointed out how last fall the PUC had eliminated net-energy metering as a consumer option, replacing it with a grid-supply option (fully subscribed on Maui and about 90 percent subscribed on the Big Island, as of last month), and a customer self-supply option (CSS). Under the latter, no energy may be exported to the utility grid, making the ability to store energy a critical part of any self-supply system.

Given this, the HGIA noted, "to create economic value for most ratepayers, PV installations under CSS require a device that stores excess electricity generated during the

The law setting up this program was intended to help low-income utility customers and other economically disadvantaged sectors share in the benefits of renewable energy technology.

day, and then discharges the stored electricity in the evening." With financial institutions "traditionally slow to offer financing for new technologies," the HGIA stated, "there is an opportunity for the GEMS program to supply capital for this inevitable transition towards PV and energy storage."

Anticipated demand-response programs (where the utility can commandeer an energy storage system to feed into the grid) and time-of-use rates would make energy storage even more of a boon, the HGIA argued. The demand-response programs would lessen the utility's burden to deliver immediate electricity during severe load spikes, it stated. The time-of-use rates would allow customers to effect savings by drawing on their stored energy during times when rates are highest. (Neither a demand-response nor a time-of-use program has been approved by the PUC. In July, the commission ordered the HECO utilities to implement a demand-response program by January 1, 2017. Rates based on time of use are being considered in a separate docket on distributed energy. Hawaiian Electric filed its most recent proposal for a time-of-use program with the PUC last November. Since then, there has been little action on that particular issue, one of many under consideration in the same docket.)

In effect, the HGIA argued, the energy-storage loans would be a win-win for all parties. They would help the utilities, the HGIA said, by encouraging custom-

ers "to stay grid-connected. ... Without these incentives [time-of-use and demand response], customers may elect to entirely disengage from the grid to the detriment of all ratepayers. ... Thus, through financing energy storage, HGIA enables the ratepayer continued access to renewable resources in a manner that is cost effective, expands the GEMS portfolio, furthers the state's 100 percent [renewable portfolio standards] goal, and aids underserved markets."

'Unlikely Benefit'

Under the operating terms for GEMS, whenever the HGIA proposes or changes a loan product, it files a "program notification" with the PUC and other parties to the docket, including the state Division of Consumer Advocacy.

For the next 15 business days, the other parties may submit comments. At the end of

that period, if the PUC does not rule otherwise, the program change can take place.

The consumer advocate, Jeffrey Ono, stated in his comments that he was not swayed by the efforts of the HGIA to find a benefit in the proposed change to allow financing of energy storage products with GEMS loans, and found that the "lack of quantitative analysis related to the market assessment and cost/benefit requirements fails to provide the commission a reasonable basis to allow the proposed program modification."

Ono went on to say, "the proposed program modification is highly unlikely to benefit underserved customers and may adversely impact both participants and non-participants."

On August 12, the PUC agreed with the consumer advocate that the analysis was deficient. In an order issued that day, it informed the HGIA that the proposed loan program for energy storage was being suspended "pending HGIA's response to the comments and concerns filed by the Division of Consumer Advocacy."



The Expanded World Of Commercial Loans

More than a year ago, in July 2015, the PUC received notice from HGIA

of its commercial loan product for energy efficiency projects. Eligible recipients were “nonprofit organizations and small businesses” served by Hawaiian Electric—small, but not so small as to fail to qualify for a GEMS loan in the minimum amount of \$1 million.

A year later, with zero small business and nonprofit loans having been issued and the agency selected to manage these loans having quit, the HGIA proposed to expand the eligibility list of to include the universe of everything other than natural persons: every nonprofit organization, business, government agency, and municipality would now, assuming PUC approval, be able to apply for a GEMS energy efficiency loan, so long as the recipient was tethered to a HECO grid and was qualified to take on a loan of at least \$1 million.

In justifying the change, the HGIA seems to abandon any pretext that GEMS is to help the economically disadvantaged. It points out that the previous commercial energy efficiency guidelines—limited to nonprofits and small businesses, as defined by the federal Small Business Administration—“does not sufficiently capture Hawai'i's commercial energy market.” A study done by a consultant for the Department of Business, Economic Development, and Tourism back in 2014, before the GEMS program was approved by the PUC, found that the commercial sector accounted for 52 percent of statewide electricity consumption.

By opening up eligibility to all commercial enterprises, the HGIA states, the GEMS commercial energy efficiency loan product “can significantly reduce the amount of electricity purchased in Hawai'i. The authority therefore redefines ‘eligible participants’ ... to include any nonprofit, small business, or other commercial enterprise.”

But “commercial enterprise” to HGIA means much more than it might to the average layperson. HGIA has expanded the definition to include all government agencies and municipalities (presumably, counties) served by Hawaiian Electric utilities.

Just how attractive a GEMS loan will be to large corporations or “municipalities” and government agencies is questionable. The HGIA states, without elaboration, that “renewable energy infrastructure and efficiency improvements by government agencies are limited.”

“GEMS therefore has significant potential to serve this market with its commercial EE loan product,” the HGIA claims. “For example, municipalities service all the water/wastewater and street lighting in the state, and therefore are responsible for a large

portion of the state's electric load.” (In fact, there are many private water and wastewater utilities in Hawai'i.)

Opening up the energy efficiency loans to “municipalities,” HGIA says, “can further the state's 100 percent RPS [renewable portfolio standard] goal” while decreasing their operating costs. Even though low-interest bonds are usually available for government-sponsored capital projects, the authority goes on to say, “there is a limit to the amount of financing that municipalities can utilize without damaging their credit rating. Municipalities therefore find value in utilizing alternate funding strategies to keep debt capacity in reserve and preserve their credit rating. An energy services agreement [ESA] ... funded in part by GEMS is ‘off-credit’ and will not impact a municipality's credit rating or debt capacity.”

The HGIA, which manages GEMS, attempted to expand the pool of potential beneficiaries – the very utilities whose customers are paying interest and principal on the GEMS bonds in the first place.

In broadening the scope of GEMS loan eligibility, HGIA also is entering territory that has in the past been served by the Hawai'i Energy program, funded by ratepayers through the public benefits fund. In a footnote, the HGIA acknowledges that “the underlying goal of the PBF is to procure electric energy savings from efficiency programs. ... The Hawai'i Energy program maintains incentive portfolios for both residential and customer classes. ... [G]overnment agencies that are commercial utility customers fall under the PBF commercial customer class and are eligible to take advantage of the Hawai'i Energy commercial incentive programs.”

But while there is recognition of the overlap with Hawai'i Energy, the HGIA proposal states only that the authority “will coordinate with Hawai'i Energy and the Public Benefits Fund administrator to ensure that resources are allocated efficiently in pursuit of commercial EE projects.”

‘A Decision to Ignore...’

A certain weariness can be read in the tone of the consumer advocate's comments on the HGIA's proposal to expand the commercial loan product. Noting that the HGIA recognized in its proposal the need to provide market assessments and cost-benefit analyses for any non-photovoltaic energy technology, the consumer advocate writes, “There is little discussion ... regarding market assessment and no discussion regarding why an expansion of the eligible participant base is

reasonable and consistent with the primary intent of the GEMS program. In fact, unlike other program notifications, HGIA did not even provide a separate section that discusses its market assessment.”

“HGIA should provide a quantitative analysis of its market assessment to support the assertion that the proposed program modification is reasonable and consistent with the GEMS objectives of assisting the underserved,” the consumer advocate goes on to say.

Regarding the missing cost-benefit analysis, the consumer advocate acknowledges that “there are energy efficiency measures that can be cost-effective and provide positive net present value to program participants.” However, the HGIA proposal has “no analysis ... that illustrates the bill impact of the use of GEMS financing for the proposed

products and measures for the additional proposed customers.”

The consumer advocate also faults the HGIA for its vagueness with respect to the Public Benefits Fund. Although the HGIA says it will coordinate with the PBF administrator, the consumer advocate notes, the HGIA “provides no details regarding how GEMS financed projects will be distinct from Hawai'i Energy's projects, including whether there is any overlap in targeted customers, or how HGIA plans to work with Hawai'i Energy to ensure that there are no duplicative costs, efforts, or programs.”

The comments conclude: “At this time, the consumer advocate is concerned with the proposed modification ... which does not appear to be consistent with the intent of the primary objective of GEMS funding and could actually diminish the funds available for interested underserved customers....”

Once again, the PUC concurred with the consumer advocate. In an order issued on August 15, it suspended the HGIA's proposed expansion of its commercial energy efficiency loan base until the HGIA responds “to the comments and concerns filed by the Division of Consumer Advocacy.”

Environment Hawai'i asked Tara Young, HGIA's executive director, when the revised program notifications for the consumer loan product and the commercial energy efficiency loan product might be resubmitted to the PUC. Young had not responded by press time.

— *Patricia Tummons*

Legislature from page 1

it assembled large landowners, agency representatives, selected organizations (the Hawai'i Farm Bureau, the Hawai'i Cattle-men's Council, for example), individuals (such as Patrick Kobayashi of the Kobayashi Group and Dennis Teranishi, head of the Pacific International Center for High Technology Research), and academics.

Although most of their work was conducted out of view of the public, last fall, HCF briefed the state Commission on Water Resource Management on the results of the group's work. One of the chief recommendations was for the state to establish a "water security and innovation fund" with an initial appropriation of \$5 million, "to be matched by a minimum of \$1 million in non-state funds." The ultimate goal is the development – through re-use, efficiency measures, and increased groundwater recharge – of an additional 100 million gallons a day of available potable water across the islands.

The bill breezed through two House and two Senate committees. Not a single piece of written testimony was submitted in opposition. The various standing committee reports were uniformly uncritical.

Suzanne Case, chair of the state Board of Land and Natural Resources, testified in support of the measure, "provided that this appropriation does not adversely impact appropriations or other priorities" in the governor's budget request or any existing funds. Case also wanted the legislators to include sufficient funds for staff oversight. (Case, it probably should be noted, was one of the members of the HCF group that worked on the water security initiative.)

The measure specifies who is to be included in the 13-member advisory group. There are to be two representatives from each of the county water boards (the manager and chief engineer); the director of the Commission on Water Resource Management; and four additional members selected by the chair of the Board of Land and Natural Resources (one with "knowledge of agricultural water storage and delivery systems;" one "from a private landowning entity that actively partners with a watershed partnership;" one "with knowledge, experience, and expertise in the area of Hawaiian cultural practices;" and one "representing a conservation organization"). None is subject to confirmation by the Senate. Five members constitute a quorum, according to the act.

Although the group is to be advisory, it is not at all clear from the language in the

bill just who within the DLNR is to receive and act upon the group's advice. There is no mention of any role of the Land Board or Water Commission, except for the Land Board chair's role in appointing council members and the inclusion of the Water Commission's director as an ex officio member. Nor is any division within the DLNR tasked with holding the purse strings.

As to whether the deliberations of the advisory group are subject to the state's open-meetings law or open-records law (Chapters 91 and 92 of Hawai'i Revised Statutes), Act 172 is silent on that point. When the question was posed to him, Jeffrey Pearson, deputy DLNR director for the Water Commission, said he would "refer to our deputy attorney general on this," adding that in his opinion, "if there is a discussion on spending state funds it will be subject to [the] Sunshine Law."

However, section 4 of the measure seems to give the new advisory group a way for it to deliberate out of the public's view. The DLNR, it states, "may contract with an independent non-profit entity to carry out the duties and activities associated with this Act."

Pearson indicated that this would likely occur, although nothing had been done by press time. Regarding selection of the members, Pearson stated that the chosen non-profit "would also work with the DLNR board chair in forming the group members."

Finally, Pearson was asked what entity within the DLNR would receive the advice of the advisory group. Pearson replied that the group itself would probably have the power to expend the appropriated funds. "I am under the impression that the group will make the decision on the use of the funds," he wrote in an email to *Environment Hawai'i* – although, he added, "I will consult with our AG on that question."

The issue of water security was the subject of another measure passed by the Legislature and signed into law. House Bill 1749 (Act 170) amends the state Water Code (Chapter 174, HRS) by adding a sixth objective to be included in the state Water Plan: "The utilization of reclaimed water for uses other than drinking and for potable water needs in one hundred percent of state and county facilities by December 31, 2045."

Both Suzanne Case of the DLNR and Scott Enright, chair of the Board of Agriculture, testified that the goal may not be achievable. Case pointed out that most state-owned facilities "are not proximal to a wastewater reclamation facility" or recycled water distribution system. To achieve the

stated objective, she continued, "either reclaimed water would have to be trucked in to each facility on a regular basis or separate dual water systems or many new wastewater reclamation facilities would have to be constructed throughout the state, which would be extremely costly."

Case also pointed out that the state Department of Health had released updated Reuse Guidelines in January of this year. The guidelines "identify areas within the state where recycled water application is conditional and restricted."

"It is very likely that state facilities are located in Conditional and Restricted Areas," Case said.

Enright requested clarification from the legislators. "If the intent is a proposal to treat and reuse on-site all potable water used, then we believe that is a laudable goal, which unfortunately may be extremely difficult to achieve," involving the treatment of water on-site to "an acceptable Department of Health standard."

While "regionalized" wastewater treatment technology may be available, Enright noted, "we are unaware of how scalable these localized treatment plants are."

The Senate, recognizing the concerns raised, amended the bill so the new objective would be to simply increase the use of reclaimed water at state facilities, "where feasible." The conference committee, however, reverted the bill back to its original form, which called for 100 percent reclaimed water utilization.

(For more on the Fresh Water Initiative, see the October 2015 edition of *Environment Hawai'i*, "Hawai'i Community Foundation's Council Unveils Blueprint for Freshwater Security.")



Advisory Commission On Game Management

For hunters in Hawai'i, the 2016 Legislature gave a lot and took maybe a little.

First, the take: House Bill 799 (Act 111) allows state employees and contractors to shoot animals from the air. Until 2012, the Department of Land and Natural Resources was able to use aerial hunts to control animals in sensitive areas. Testimony from acting DLNR head Carty Chang in 2015, when the bill was first heard by the House Water and Land Committee, pointed out that the DLNR's aerial shooting policies "were updated and approved by the Board of Land and Natural Resources in 2006 following a publicly vetted process."

Chang's testimony ran to five pages and included 38 footnotes. Among the points he raised (and documented) was the fact that, in many places, "aerial shooting is the only method to control hooved animals due to remote, steep, and dangerous terrain, such as the 3,000-foot-high cliffs of Moloka'i's north shore. Placing staff or the public into such areas is either impossible or creates an unacceptable safety risk." He noted that the DLNR had been conducting aerial shooting to protect natural resources "for decades."

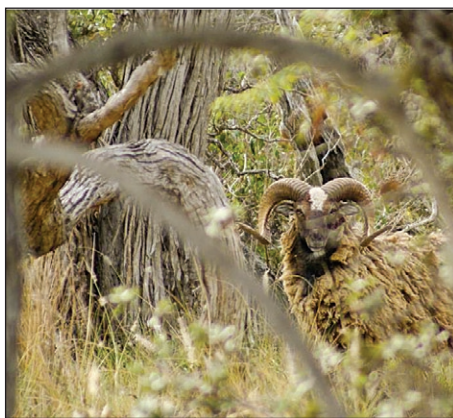
All that changed in 2012, when the Hawai'i County Council, responding to pressure from the hunting community, enacted an ordinance that made aerial control of animals illegal. U.S. District Judge J. Michael Seabright issued an order a few months after the ordinance took effect that overrode the county action – but only for aerial shoots on Mauna Kea needed to reduce numbers of sheep in palila critical habitat.

In addition, hunters across the state began to point to Section 263-10 of Hawai'i Revised Statutes, a law passed by the Territorial Legislature in 1923 that prohibits aerial hunting. The very title of the act — "The Uniform Aeronautics Act" — and the reference in its language to "aeronauts" suggest its origins in an age when air travel was a novelty.

The Nature Conservancy of Hawai'i pointed this out in its testimony. The law, it stated, was "part of a larger Uniform Aeronautics Act being adopted in mainland states at a time when the military was urging states to standardize basic civilian flying regulations." There was no evidence that the measure was intended to limit state action, its testimony continued, and, in fact, there was no idea at the time "that controlling animals in this way would be an important tool for meeting the state's public trust responsibilities a century into the future."

In 2014, after trying and failing to work out an agreement with Hawai'i County prosecutors that would immunize the state and its contractors from prosecution should aerial hunts continue outside of palila critical habitat, the state itself challenged the ordinance in 3rd Circuit Court in 2014. Judge Glenn Hara dismissed the lawsuit in December of that year, meaning that the state was restricted, at least in Hawai'i County, to aerial shooting only on Mauna Kea.

HB 799 changes that, giving the state legal authority to have its employees and contractors "intentionally kill or attempt



Mouflon ram in a Hawaiian forest.

PHOTO: RILEY DEMATOS

to kill any wildlife in furtherance of official state duties" while in flight.

Testimony on the bill was sharply divided. Generally, hunters were opposed or sought to amend the bill by requiring the state to consult with them before scheduling aerial hunting or that aerial hunts be limited to "remote and inaccessible areas where access to wildlife may pose [a] hazard to human life." When the bill was next heard, in the 2016 session, testimony in support came from a broad sector of the public, including landowners who, in cooperation with the state, had been working to remove feral ungulates from remote areas of their holdings.

Jordan Jokiel of Haleakala Ranch, for example, testified that unmanaged and/or uncontrolled introduced wildlife "are a major threat to the health of Hawai'i's native forests, watersheds, unique and endangered species, and economy. On portions of Haleakala Ranch, feral cattle destroy fences, mingle with domestic livestock, and often-times create out-migration of commercial cattle stock. In addition, wild cattle pose a very serious safety issue to ranch staff and others in the field. Feral pigs, goats, and Axis deer pose similar problems and also contribute significantly to increased erosion, sedimentation, and direct damage to pasture forage and other crops."

Jokiel praised the DLNR for its efforts to control animals in the Nakula Natural Area Reserve and the Kahikinui Forest Reserve, areas that adjoin the ranch's grazing areas. "Without this tool the ranch would likely still be faced with many of the ongoing operational challenges mentioned above," he wrote.

Despite the significant opposition from dozens of hunting groups, individual hunters, and some unlikely allies, including the Humane Society of the United States, the measure made it into law.

Then came the give: House Bill 1041 (Act 210) responds to demands from

hunting groups that there be a statewide Game Management Advisory Commission within the DLNR. It establishes an eight-member commission — plus the chair of the Board of Land and Natural Resources. All eight appointed members must be licensed hunters. Also, it provides \$40,000 to support the commission in its first year — although the DLNR estimated that the level of support called for in the bill itself would come to \$100,000 or more.

According to testimony from BLNR chair Suzanne Case, since the bill was first introduced in 2015, the DLNR had worked with "representatives from the County of Hawai'i's Hawai'i Game Management Advisory Commission and other interested hunters to come to agreements on amendments to enhance the effectiveness of this bill."

While the DLNR may have ironed out some of the issues with the hunting groups, whose members supported the bill with testimony from more than a hundred of their members and allies, the lone conservation group to submit testimony on the measure was opposed to it. Marjorie Ziegler, testifying on behalf of the Conservation Council for Hawai'i, called the bill unnecessary, noting that "hunters may already advise the BLNR on hunting matters, and they do."

"Hunters will always feel like they are losing hunting areas, even when they have more than enough land and animals to hunt. The number of acres of hunting area far exceeds the number of acres of actively managed and protected watersheds and native species habitats. Furthermore, there is no shortage of feral pigs, goats, sheep, mouflon, and deer in Hawai'i; there are too many of them.

"Do not waste time and money on a one-sided commission that will not address the inherent conflicts between introduced continental barnyard animals gone wild and wildlife (deer), and native Hawaiian species and habitats."

The legislation states that the new commission shall, among other things:

Advise the Land Board on "any matter affecting hunting;" Assist in evaluating and developing game management plans; "Advise on studies of areas for sustainable yield game production or enhancement;" "In carrying out its duties, consult the most comprehensive up-to-date compilation of scientific data;" and "Assist the department on policies, plans, and procedures related to the control of game mammals, including aerial shooting activities by the department and its contractors."



A Boost for Inspections Of Agricultural Invasives

House Bill 1050 (Act 243) is intended to curtail the inter-island transport of invasive species, particularly those affecting agricultural and export crops. Assigned into law by Governor David Ige, the legislation requires the state Department of Agriculture to include in its annual biosecurity report to the Legislature all expenditures related to activities called for in the new law as well as a list of activity-related travel; workforce allocation; and measures of effectiveness. In addition, there is to be a summary of inspections conducted for both inter-island shipments and exported agricultural products. If any activity is not completed, the DOA is to explain why.

The activities the new law imposes on the state Department of Transportation (DOT) include:

- Development of an interisland and export database that can track agricultural products (the DOA says it already has this);
- Increasing the priority of inspection of inter-island shipments while not “impacting or jeopardizing the inspection of imported agricultural commodities from out of state;”
- Developing quarantine treatments for high-risk commodities moving between islands; and
- Coordinating with the DOT in planning for inspection and quarantine treatment capabilities near ports of entry.

The act gives the DOA \$100,000 for carrying out all those tasks. It also provides \$800,000 to the department to “increase detection, response, and control programs to address agricultural pests statewide” and \$1 million to begin planning, site selection, and preliminary design for two facilities on the Big Island where food and non-food agricultural products can be treated before being exported either within the state or abroad.

Finally, the act appropriates \$100,000 for the legislative auditor to conduct a financial and performance audit of the DOA’s plant quarantine branch. That audit is to be completed before the start of the 2017 legislative session.

Although the findings section of the act suggests that the island invasive species committees and the Hawai'i Invasive Species Council (HISC) limit their control efforts to conservation lands and residential areas, Big Island Invasive Species Committee manager

Springer Kaye suggested in testimony that that simply will not happen.

“Early detection and rapid response is not site-specific, rather, it is species-specific. We go wherever the pest is, whether it is on residential, conservation, or agricultural lands,” she wrote.

In addition to the funds appropriated in HB 1050, the plant quarantine branch received \$5,547,050 in general funds called out in the state budget (HB 1700). That’s a slight decrease from the \$5,659,086 it received in the previous fiscal year and is more than \$200,000 short of what the governor had requested (\$5,789,598). What’s more, the number of authorized positions was reduced by five – to 79 from 84.



\$300,000 Appropriated For Rapid ‘Ohi’a Death Research

Ceratocystis fimbriata, the fungus that causes rapid ‘ohi’a death, is certainly an invasive species of pathogen on the Big Island, and the plant quarantine branch of the DOA has the primary responsibility to ensure it doesn’t spread to other islands. Yet the increase in funding for this branch is focused entirely on agricultural pests.

‘Ohi’a makes up half the woody biomass of all forests in Hawai'i, including its most significant watersheds. Yet funds for research into the causes and potential cure for rapid ‘ohi’a death received less than half of that given to the new Water Security Advisory Group, with House Bill 2675 (Act 102) appropriating just \$300,000 for this purpose.

As introduced, the bill called for spending \$325,000 on this effort. That amount doesn’t begin to approach what is needed. As Christy Martin of the Coordinating Group on Alien Pest Species (CGAPS), informed the House Committee on Water and Land, “The current estimated need to support the priority positions and work is \$1M/year. For calendar year 2016, we have \$750,000 secured: 40 percent private, 40 percent state, 20 percent federal. However, the majority of these funds will be depleted by the end of 2016.”

Marjorie Ziegler of the Conservation Council for Hawai'i also urged a larger appropriation, more in line with the enormous risk that rapid ‘ohi’a death poses for watersheds and native habitat.

When the Senate Committee on Water, Land, and Agriculture passed the bill out, it increased the appropriation to \$600,000. This amount, said Land Board chair

Suzanne Case in testimony to the Senate Committee on Ways and Means, “would fund approximately 50 percent of the budget for ROD-related activities ... for fiscal year 2016-2017. This appropriation would be used to leverage federal and private funds to make up the other 50 percent.”

The Ways and Means Committee was unswayed, reporting the bill out with an unspecified appropriation. When the bill finally emerged from conference committee, the appropriation was even less than what the bill originally proposed.



A Ban on Sales Of Ivory, Rhino Horns

The environmental measure that drew some of the most impassioned testimony had little to do with Hawai'i's environment, but much to do with Hawai'i's role in the global trade of endangered species — particularly elephant ivory.

Senate Bill 2647 (Act 125) generally bans the sale in Hawai'i of any part or product made from elephants, rhinos, tigers, great apes, lions, hippos, cheetahs, jaguars, leopards, and pangolins. It also prohibits the sale of parts or products made from a host of endangered and threatened marine species, unless the sale is specifically authorized under the federal Marine Mammal Protection Act. Also banned is the sale of any product or part made from fossils of the woolly mammoth.

There are certain exceptions. For example, if the seller has documentation showing the otherwise banned product is an antique at least 100 years old, or if the ivory or another banned product is a decorative element in an antique musical instrument, the sale of the animal product is allowed. There is also an exemption for “traditional cultural practices” called out in Article XII, Section 7 of the state Constitution.

Although the measure took effect when Gov. Ige signed it on June 23, there is to be no enforcement until June 30, 2017.

Many of those testifying in favor of the ban mentioned a 2008 study that showed Hawai'i to be the third-largest market for illegal ivory in the United States, second only to New York and California.

Those few who opposed the measure cited the hardship it would impose on legitimate dealers in legal scrimshaw. Also submitting testimony in opposition was the National Rifle Association, the Hawai'i Rifle Association, and the Elephant Protection Association.

Water Board Grants Permit, Waives Fine For Maui Taro Farmer's Stream Diversion

At the end of a long and sometimes emotional meeting, after most of the public had gone, Jeffrey Pearson apologized to members of the state Commission on Water Resource Management for having them spend so much time on something that maybe shouldn't have come before them in the first place.

As the commission's chief executive officer, Pearson was responsible for forwarding his staff's recommendation last month to grant Maui water rights icons John and Rose Marie Duey an after-the-fact stream diversion works permit for a pipe they installed in the Wailuku River more than a decade ago to feed their land. But staff also

proposed that the commission find that the Dueys had violated the state Water Code and impose a fine of \$4,500 for failing to secure the permit in a timely manner.

The fine recommendation quickly drew ire from members of the public who follow water issues. Attorneys with the environmental law firm Earthjustice and the University of Hawai'i law school who had been working with the Dueys and commission staff toward a resolution of the outstanding permit jumped to the couple's defense.

"It's like fining Rosa Parks for sitting in the wrong seat on the bus," Earthjustice's



Advisory Committee On Red Hill Tanks

House Bill 2646 (Act 244) establishes a permanent Red Hill Advisory Committee, which is tasked with reviewing issues related to underground storage tank (UST) leaks not only at Red Hill, where fuel leaking from the enormous underground tanks dating back to World War II has the potential to enter O'ahu's most important source of potable water, but also at other military facilities, including Kuahua Peninsula (Pearl Harbor), Pacific Missile Range Facility (Kaua'i), Hickam, and Schofield Barracks.

The legislation calls for 14 ex officio members. Eleven are made up by the heads of the state Departments of Health and Land and Natural Resources; the director of the Water Commission; and representatives from each member of Congress, the president of the state Senate and the speaker of the state House of Representatives, and the Environmental Protection Agency; the head of the Honolulu Board of Water Supply. In addition, the Army, Navy, and Air Force are invited to send representatives of their branches of service. Finally, the governor is to appoint two members of the community at large.

The Department of Health is given ad-

ministrative authority over the committee, and the director of the DOH is named as its chair. However, no funds are appropriated for the committee's work.



Shoreline UST Ban Tied To Rising Seas

The Legislature finds that climate change is real and that sea level rise poses a threat to our quality of life." That language, in the preamble to House Bill 2626 (Act 179), points to the sharp difference between legislators in Hawai'i and those in numerous other states where legislative majorities refuse to acknowledge climate change, much less deal with it.

Still, anyone thinking that the strong words were setting the stage for robust action would have been mistaken.

The measure notes that the "inundation of underground fuel storage tanks poses risks to our aquifers, coastal water quality, and marine ecosystems." To address this, it calls for a prohibition on the Department of Health issuing permits for new underground fuel storage tanks within 100 yards of the shoreline — but it won't take effect until nearly three decades from now.

While the bill as drafted called for a complete ban on the operation of any nearshore UST and renewal of any permit for a nearshore UST by 2030, that date was

pushed back to January 1, 2045, in the final measure. Between now and then, the DOH will still be able to issue permits for the repair or replacement of existing USTs near the shoreline.

The 15-year pushback of the deadline was in response to testimony from representatives of the petroleum industry. James Haynes, president of Hawai'i

Petroleum, Inc. (owner of Ohana Fuels stations on Maui and Hawai'i) claimed the measure amounted to an "unconstitutional regulatory taking which impairs the value of property without payment of just compensation." Furthermore, he warned that the 2030 deadline "will effectively wipe out almost all existing gasoline stations along the coastline of all the major islands."

Lance Tanaka, representing Par Hawai'i, a subsidiary of Par Pacific Holdings, Inc., of Texas, and Richard Parry, president of the Hawai'i Petroleum Marketers Association, also argued the bill represented an unconstitutional taking.



And Worth Mentioning...

House Bill 2501 (Act 126) allows for holdovers of water leases for three years. This law was pretty much designed to benefit A&B, whose use of water from East Maui streams has been challenged for years. *Environment Hawai'i* reported on this bill in our August 2016 edition. (See "Recent Court Rulings May Complicate State's Ability to Grant A&B a Holdover.")

House Bill 2036 (Act 216) extends the 180-day decision deadline for a Conservation District Use Permit application whenever an environmental impact statement is required or a contested case hearing is held. The length of the extension depends on the time it takes for the contested case or EIS process to be completed, which can be and has been years in some instances.

Here's what the new law says: "When an environmental impact statement is required ... or when a contested case hearing is requested ... the one hundred eighty days shall be extended an additional ninety days beyond the time necessary to complete the requirements of chapter 343" — the EIS statute — "or chapter 91" — the contested case statute. — **Patricia Tummons**

SOURCE: U.S. NAVY



Members of the Board of Water Supply, the Pearl City Neighborhood Board, and the Moanalua Valley Community Association visit one of the fuel tanks at Red Hill.

Isaac Moriwake said of the commission staff's proposal.

At the Water Commission's August 16 meeting, representatives from the Office of Hawaiian Affairs, the Sierra Club of Hawai'i, Hui o Na Wai Eha, and others joined the Duey family in expressing their outrage at what they saw as unnecessary and unfair persecution of people exercising their constitutionally protected water rights. Even Maui mayor Alan Arakawa submitted testimony asking that the commission consider mitigating the fine given all that the Dueys had done over the years to restore severely dewatered streams in West Maui.

The Water Commission ultimately voted to approve the permit, but not the fine. Nearly all of the commissioners at some

and luau leaf.

"This is the first of several enforcement actions dealing with stream diversion works, dealing with taro," commission staffer Rebecca Alakai said at the commission's January 28 meeting. Although taro growing is considered a traditional native Hawaiian practice, which some have argued doesn't need a permit, "if there's no penalty, then we lose all control over granting permits," she said. "I totally understand the issues with traditional and customary practices and appurtenant rights," she added, "but ... I'm not sure if you should say that [diverting without a permit is] fine for this crop and not fine for that crop."

The commission's stream protection and management program manager Dean Uyeno explained that while a diverter may have a right to the water, the law requires a permit be acquired to take it. Without the permits that document stream diversions, the commission would have a difficult time managing competing water uses, he argued.

Commissioner Kamana Beamer said he understood staff's desire to avoid setting a precedent of letting anyone use the stream whenever they want. "At the same time, I'm just trying to figure out, have we thought through this in the adverse?" he asked, noting that there are thousands of ancient Hawaiian stream

diversions, some of which have been "updated."

"Are we going to go and fine all these users 900 bucks or in excess of that ...?" he asked. He later suggested that the commission develop a process to deal with issues surrounding traditional and customary rights and appurtenant rights so the commission isn't fining people who've been farming taro in valleys where it's been cultivated for 900 years.

"That makes no sense to me at all, especially given the fact that we've visited water systems on other islands and we've seen taro streams diverted by ... flumes ... run by private companies that are drawing revenues off water," he said.

Uyeno explained that back in 1989, the commission initiated a registration process for stream diversions throughout the state that captured most of the current taro growing areas as well as the plantation irrigation systems. He added that those who can prove they were using water at that time

can simply register their diversion with the commission.

In the case of Kamehameha Schools, new diversions, including pumps, were installed, he said.

"It might have been a different case if they were using a traditional auwai," he said, referring to the irrigation canals that Hawaiians built to irrigate taro.

With regard to the proposed fine, some commissioners complained that it was just a "slap on the wrist" for such a wealthy entity.

"It's just not right, an institution of that magnitude does something like this and gets away with it. I mean \$900, they drop that money on the floor when they put their pants on in the morning," said commissioner William Balfour.

Kamehameha Schools representative Joey Char stressed that the organization took action as soon as it was made aware of the fact that it lacked a permit for the diversions.

"It really was just, for lack of a better term, an oversight," she said.

According to its report to the commission, staff considered Kamehameha Schools' willingness to act quickly and in good faith to remedy the problem as a mitigating factor when it set the proposed fine, which the commission ultimately approved.

Staff Report

At the same January meeting, Uyeno said commission staff was with dealing with cases similar to the Kamehameha Schools case on the four West Maui streams collectively known as Na Wai Eha (Wailuku and Waihe'e Rivers and Waiehu and Waikapu streams). The non-profit group Hui o Na Wai Eha — co-founded by John Duey — initiated a contested case on the use of water from those streams more than a decade ago and hearings are ongoing to determine the amounts of water to be allocated via water use permits. In addition to commercial users, more than 100 appurtenant rights claimants are vying for the same water. "That's when permitting comes into play; we need to balance those uses," Uyeno said.

In the meantime, with tens of millions of gallons of water a day now flowing in those streams as a result of another contested case hearing and a 2014 settlement agreement, some people have decided on their own to stick pipes into the stream.

"Now we have to chase the guys down because it's not fair to everybody else who's been waiting in line for their permit," Uyeno said.

In the course of ensuring that all existing



A portion of the pipe installed into the Wailuku River by John and Rose Marie Duey.

point apologized to the Dueys, who had to fly in to Honolulu to defend themselves. What's more, the commission voted to radically increase the amount of water they could divert and instructed staff to work toward creating an expedited permitting process for traditional and customary uses of water — such as growing taro — which are protected under the state Constitution and Water Code.

Cracking Down

The Dueys were not the first taro farmers to land in the Water Commission's crosshairs this year. In January, the commission fined Kamehameha Schools \$900 for allowing its tenants, farmers Alfred Harada and Sierra-Lynn Boro-Harada, to install eight intakes in Kaua'i's Lumaha'i River more than a decade ago without a permit. Those intakes together divert more than a half a million gallons of water a day (mgd) from a stream that has an average flow of 75 mgd. The farmers grow not only taro, but banana, ti

water users in the Na Wai Eha contested case have authorized diversions, Water Commission staff found that the Dueys' company, Ho'ouluhului, LLC, did not have an approved stream diversion works permit for 800 feet of pipe installed some time after 2001. The pipe diverts about 26,600 gallons per day for domestic and agricultural uses, including taro farming.

In 2004, a staff report states, the Dueys were informed that they needed to apply for a diversion permit, which they did in 2005. The commission deemed the application incomplete, however, and directed the Dueys to provide more information (i.e., a scale drawing and vicinity map) and to file a petition to amend the interim instream flow standard (IIFS). A contested case hearing on the IIFS was ongoing at the time, however, and wasn't resolved until nearly a decade later. In April 2014, the IIFS for the Wailuku River, from which the Dueys drew their water, was set at 10 mgd under a mediated settlement with the Hui, Maui Tomorrow Foundation, the Office of Hawaiian Affairs, Hawaiian Commercial & Sugar Co., Wailuku Water Company, and the County of Maui Department of Water Supply.

The Dueys refiled their application in May 2015, but did not include a filing fee or the previously requested information, the staff report states. Even so, in February, the Dueys submitted a briefing in the water use permit contested case indicating that they are seeking 1.4 mgd from Wailuku River for new and existing uses.

On March 9, the commission issued them a Notice of Alleged Violation for the diversion and gave them until April 8 to explain how they intended to resolve the matter. Within a week, attorneys with Earthjustice (Isaac Moriwake and Summer Kupau-Odo) and the University of Hawai'i law school (Kapua Sproat) met with commission staff, on behalf of the Dueys, to discuss the steps necessary to resolve the alleged violation. But by April 8, the report states, "the commission received no response from the Dueys." Less than a week after being notified on April 27 that the matter would be brought to the Water Commission, however, the Dueys submitted the information needed to complete the application.

In an attempt to be consistent in its enforcement, commission staff strictly applied its penalty guidelines, which allow for fines to be increased to reflect the gravity of the violation or reduced when there are mitigating factors. In the Dueys' case, staff found that the diversion of 26,600 gpd

(22,000 of which is returned to the river) was an insubstantial modification of the IIFS, but that the Dueys had not made a good-faith, speedy or diligent effort to remedy the violation or had self-reported it in a timely manner. Instead, the staff report states, "Over a 12-year time span, commission staff contacted the Dueys regarding the need for a permit, including many phone and in-person discussions with the applicant and his representatives. Hui o Na Wai Eha is a party in numerous proceedings before the commission. Mr. Duey, as president of the Hui, is well aware of Water Code requirements regarding permit requirements in Water Management and non-Water Management Areas." The report added that the Dueys had failed to meet the April 8 deadline to contact the commission and they "only responded after staff emailed a reminder of the Notice of Alleged Violation and a copy of the Civil Penalty Guideline."

In its August 16 submittal to the commission, staff recommended imposing a \$500 administrative fee, plus a penalty of \$250 a day for the 16 working days between April 8 and May 3, when the Dueys' application was deemed complete. In lieu of paying the penalty, staff gave the Dueys the option of completing a project that results in "new water resources information, provides water resources education, or benefits the water resources of the state."

'Tone Deaf'

By the time the Water Commission met on August 16, it had received an abundance of testimony against the proposed fine. Had he not been a commissioner himself, Mike Buck might well have been among them. When it came time to question staff, he led by asking Uyeno whether he believed the Dueys were trying to go through the permitting process in good faith.

"I do. We hold the Dueys in high regard. ... We recognize the work they've done," Uyeno said, referring to their years of effort to restore Na Wai Eha and other taro growing areas on Maui. Still, he noted, staff has been following up on illegal diversions in Na Wai Eha and elsewhere. Some who've been notified of their potential violations have promptly removed their diversions, he said. The Duey case, however, "has been on the books for a while. Especially with the contested case pending, we wanted to make sure they're legal."

Buck expressed his concern that the case may put the Water Commission in a bad light at a time when it is about to fully implement the state Water Code for

the first time.

Given all the actions the commission has ahead of it, "it's unfortunate we have this case," Buck said. "We need public support to implement the Water Code. I think it's important we're not tone deaf."

When commissioner Neil Hannahs asked Uyeno what kind of project he thought the Dueys could do as an alternative to paying the fine, Uyeno said he hadn't given it any thought, but, "quite frankly, knowing the Dueys and the work that they've done, [it] should certainly serve as an alternative."

Commissioner Beamer lamented that the staff's report didn't include any statement of whether or not the diversion was part of a traditional and customary practice or any analysis of whether there was an auwai. Uyeno stressed that the case was not bringing into question anyone's water rights or usage, but merely dealt with the lack of a diversion works permit. Even so, Beamer reiterated his suggestion that the commission have a separate process for dealing with people who have traditional and customary rights.

'Baffled, Frustrated, and Angry'

When it was Rose Marie Duey's turn to testify, one of the first things she pointed out was the fact that her property had once been fed by a traditional auwai, but it was later bulldozed by another property owner. Uyeno's predecessor, David Higa, was aware that their auwai had been bulldozed and he gave them permission by phone to put in a pipe, she said.

"Today, I am baffled, frustrated, and angry. This represents the absolute worst of bureaucracy," she continued. "Someone ran across the Dueys permit application and decided to fine us \$4,500. Imagine that, \$4,500 and for the past 15 years we have been doing your job," referring to the fact that it was her family, and her husband, in particular, who filed petition to amend the IIFS of Na Wai Eha.

After a long contested case hearing on the petition, the Water Commission issued an order that did not include restoring water to Wailuku River. The Hui successfully appealed the decision to the state Supreme Court, and the matter was later settled in 2014. But despite that settlement, in which Hawaiian Commercial & Sugar and Wailuku Water Company committed to restoring 10 million gallons of water a day to the river, nothing happened for six months and those at fault were never fined, she said.

As for her case, she said, "I thought we were working together for another permit.

... Instead, you were working to fine me after your staff gave me permission to put in a pipe."

In 2003, the Dueys approached the Water Commission about installing the pipe, sending photos and a map to Higa, according to Rose Marie's daughter Nani Santos. In discussing the permit with Higa, Rose Marie said she asked about her traditional and customary rights. "That's when Mr. Higa said, 'If you are a Hawaiian and farming traditional kuleana lands, you don't need a permit. I believed what Mr. Higa said and laid the pipe. That was not a cheap pipe. I would not have put money into that without permission,'" she said.

She noted that commission staff informed them earlier this year that they would need to petition to amend the IIFS again, but later retracted that position. She also took issue with the staff's claim that they did not respond to the commission's requests. "We immediately responded," she said, noting that attorneys on their behalf met with commission staff.

"During that meeting, nobody informed us we would be fined for every day our application was incomplete," she said.

Santos later added that on March 16, the day the attorneys met with CWRM staff, her mother had written a letter about three items deemed incomplete, but staff failed to mention that in its submittal. And Earthjustice counsel Summer Kupau-Odo also testified later that at their meeting with staff, it was understood that the Dueys had to complete four items, one of them being to ask the U.S. Army Corps of Engineers to determine whether the work required a Corps permit as well. Getting an answer to that, she said, took some time and in the meantime there were emails and phone calls with commission staff.

Rose Marie scolded the commission for not doing more to protect the auwai that once served her land. "I would not be here if the ancient auwai system had been protected and water flowed into the manawai. Neither would we be going through the [water use permit process]. Our waters would still be there and protected."

"I have traditional and customary native Hawaiian rights to grow kalo and feed our family. ... We trust you will make this right by issuing our permits without a fine," she said finally.

Commissioners William Balfour, Suzanne Case, and Hannahs all thanked Rose Marie for "clearing the air." Case and Hannahs went so far as to apologize.

Despite their apologies, Santos sounded off on the commission and its staff. Noting

the \$900 fine for Kamehameha Schools for 15 years of diverting without a permit, she challenged someone to step forward and justify the fine against her family, especially since it was her family who initially contacted commission staff about the pipe 13 years ago.

"Charges and suggestions we were non-responsive are false. Convenient dates were eliminated. It's no wonder my parents are exhausted and frustrated by this whole process," she said. "This commission has asked for a tremendous amount of proof. ... When will you do the same for the huge diverters of our stream waters?"

Kupau-Odo also pointed out that the Dueys had responded to all of the commission's requests for information within a month and a half of meeting with staff.

"We're urging you to consider the countless personal sacrifices they endured over the years. I don't think people understand what it's like to be at the forefront of litigation," she said. "It's a burden they've had to shoulder."

'Travesties of Justice'

UH law professor Sproat, formerly one of the Earthjustice attorneys who filed the Hui's various petitions aimed at restoring and protecting West Maui water resources, was the final testifier. Sproat, who directs the university's environmental law clinic and provides support to commission staff, said that in all of her years, "this is one of the greatest travesties of justice and one

of the worst instances your staff has got it wrong. ... Uncle John and aunty Rose aren't whiners. What your staff has put them thorough is just wrong, legally, morally, and practically," she said.

Echoing Beamer's earlier suggestion, Sproat urged the commission to adopt an expedited permitting process for people like the Dueys, similar to what the state has done for those wanting to restore ancient Hawaiian fishponds. She also suggested that in approving their permit, the commission amend the amount to be taken from the stream from 26,600 gallons per day to something that better reflects what they will actually be taking once the water use permit process is complete.

The commission ultimately voted to approve the permit for a pipe diverting up to 410,000 gallons per day, which Sproat said reflects the amount that was considered in the 2014 settlement over the Wailuku River's IIFS. The permit would acknowledge that amount would be for domestic and diversified agriculture uses and any excess would be returned to the river. What's more, the diversion would ultimately be subject to the water use permit. The commission deleted all recommendations regarding a violation or fines and also directed its staff to work on an expedited permitting process for traditional and customary uses of water — a process state Department of Hawaiian Home Lands representative Kaleo Manuel said his agency would be willing to participate in.

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Aftermath

In the wake of the commission's decision, staff is concerned that the public may interpret it to mean that anyone, not just native Hawaiian taro farmers, don't need to obtain permits, Uyeno told *Environment Hawai'i*. "We are also wary that this may begin to take us down the road of having to consider native Hawaiian lineage, etc. What happens if a taro farmer is not native Hawaiian, or a native Hawaiian is growing something besides kalo, or the kalo cultivation is associated with a larger commercial tourism venture?" he asked.

"We can see this happening to a small degree in East Maui and Na Wai Eha when streamflows are restored," he continued. "People see more water in the stream, so now there is water available for them to use as well. If enough people take water, then we're right back in the same situation. As we work to develop measurable instream flow standards, recognizing that some are via contested case hearing, there needs to be an accounting of all diversions to ensure that the instream flow standards are complied with. The SDWP [stream diversion works permit] process is one tool to help the Commission account for flows diverted from the stream."

He added that the existing permitting process is not difficult and that staff tries to process all permits within 90 days, but difficulties sometimes arise out of issues outside the commission's jurisdiction (e.g., land access to where the diversion/transmission is located). "At some point, we issue a notice of alleged violation to ensure that the diverter understands and acknowledges that a violation occurred. This starts the clock ticking to ensure that the process keeps moving forward, particularly when it appears that the applicant may be delaying the process," he said. — **Teresa Dawson**

Taro Farming Group Notes Failure Of State to Enforce Flow Standards

At the Commission on Water Resource Management's August 16 meeting, Hokuao Pellegrino of the non-profit Hui o Na Wai Eha was one of the many testifiers who asserted that the agency was unfairly targeting John and Rose Marie Duey for the pipe they had installed in the Wailuku River more than a decade ago after a neighbor allegedly bulldozed the ancient Hawaiian auwai that once served their land. The commission chose that day to refrain from fining the couple, but not before Pellegrino announced that his organization would be filing complaints regarding the commission's failure to enforce interim instream flow standards (IIFS) for Wailuku and Waihe'e Rivers and Waikapu stream agreed to in an April 2014 settlement.

Pellegrino complained that Wailuku Water Company (WWC), which operates much of the ditch system that diverts the streams, took more than six months to implement the IIFS, when it had originally stated it would take two months at most. He claimed that the company restored only a fraction of the 2.9 million gallons a day (mgd) designated for Waikapu Stream and the 10 mgd for the Wailuku River.

Pellegrino testified that the WWC and Hawaiian Commercial & Sugar (HC&S) had also failed to provide enough water to ensure a steady flow from the mountain to the sea, a standard required under the settlement. Despite asking the commission to act, nothing was rectified for more than five months, he said.

"The commission did not impose any fines for HC&S to weld two plates that took less than a week. And the failures to comply with the settlement continue, he argued, citing commission monitoring reports, which

he said show that from January through April, WWC has again failed to provide 10 mgd to Wailuku River.

Pellegrino also complained about the commission's spotty monitoring and lack of data to determine whether the IIFS are being met. He touted the U.S. Geological Survey's stream gages, which provide information in real time that "you can check on your phone, your computer."

Commission staff is currently getting its stream data from pressure transducers that are checked in-person periodically.

"The trend since 2014, pressure transducers are only read every four months. If they [WWC and HC&S] aren't complying, we won't know for four months," Pellegrino complained. With regard to Waihe'e River, there has been no reporting since 2010, he said.

Pellegrino added that a ruler bolted to the Wailuku River allows anyone to see how much water is flowing, but WWC has denied public access to it.

Commission chair Suzanne Case said the agency can't afford to install expensive stream gages right now. Uyeno told *Environment Hawai'i* that USGS gages cost about \$21,000 apiece and "there are budgetary and physical limits to what the USGS is capable of."

"We stand by our current gaging efforts, but what needs to be discussed and developed internally is an enforcement policy and enhanced monitoring efforts that are not so costly (and can be funded and maintained by diverters)," he added.

As of press time, the commission had not received the aforementioned complaints from Pellegrino or the Hui. — **T.D.**