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Environment Hawai'i
a monthly newsletter

Blown Off Course

When a tiny ʻopeʻapeʻa flies into — or even too close to — the huge blade of a wind turbine, it's really no contest. And that's why a firm that plans to build nine or more wind turbines on Oʻahu's North Shore has to come up with a proposal to reduce harm to the endangered Hawaiian hoary bat.

But a hearing officer in a contested case over the sufficiency of the wind farm's proposal has found it sorely lacking in measures that would result in protections for the species.

Also in this issue:

- The most recent developments in the complicated – to put it mildly – efforts of Scott Watson and his partner to build a house along the Pepeʻekeo shoreline;
- Our regular wrap-up of Land Board actions;
- The Public Utilities Commission's rebuke of the Hawaiʻi Green Energy Infrastructure Authority.

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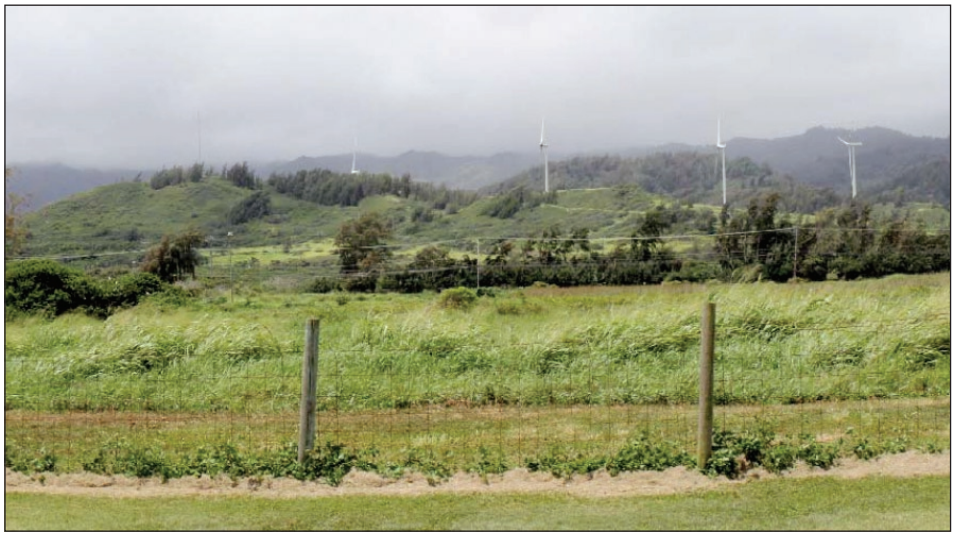

IMAGE: HCP FINAL EIS

A rendering of the proposed Na Pua Makani wind farm at Kahuku, Oʻahu.

Wind Farm Plan to Protect Rare Bats Is Inadequate, Hearing Officer Finds

One year ago, the state Board of Land and Natural Resources granted a contested case hearing to the community group Keep the North Shore Country, which opposed a recommendation made a month earlier by the Department of Land and Natural Resources' Division of Forestry and Wildlife to approve a habitat conservation plan (HCP) and incidental take license (ITL) for a wind farm Na Pua Makani Power Partners, LLC, plans to build in Kahuku, on Oʻahu's North Shore.

In her proposed decision and order issued on Halloween, hearing officer Yvonne Izu systematically picked apart the the company's HCP, which is supposed to guide the company's efforts to protect endangered Hawaiian hoary bats, or ʻopeʻapeʻa, and other protected species from the nine wind turbines that will make up the 27-megawatt facility.

Her decision is yet another attempt by the state in recent months to address more thoroughly the impacts of wind farms in light of new data suggesting that they are killing far more bats than predicted and/or allowed for by federal and state permits. It comes on the heels of an October 27 decision by the Land Board to require the Auwahi wind farm on Maui to complete a supplemental environmental impact statement for its proposed ten-fold increase in bat takes.

Parties to the contested case must file by December 7 their exceptions to Izu's recommendation to deny the HCP for the Na Pua Makani wind farm. Responsive briefs are due on the 29th and the Land Board is scheduled to hear oral arguments on January 12.

Whether or not the lack of an approved HCP will derail the project remains to be seen. One facility, the Lalamilo wind farm run by the Hawaiʻi County Department of Water Supply, has been operating without a final HCP since last September. State Sen. Gil Riviere, president of Keep the North Shore Country, said there are other

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NEW AND NOTEWORTHY

Aquarium Collection Update: On September 6, the Hawai'i Supreme Court justices issued a unanimous ruling that the Department of Land and Natural Resources had to complete an environmental study of the effects of aquarium fish collection before issuing permits sanctioning the practice. The ruling remanded the case to the 1st Circuit Court for further actions consistent with the court's ruling.

Judge Jeffrey Crabtree was slow to issue an order to enforce the high court's decision, prompting the plaintiffs in the case — four individuals and three non-profit organizations — to file a writ of mandamus with the Supreme Court to force Crabtree's hand. That writ was eventually denied as Crabtree, on October 27, issued an order declaring existing aquarium-collection permits to be illegal and invalid.

The lower court had been expected to decide whether the collection of aquarium fish for non-commercial purposes required environmental review as well. Instead, Judge Crabtree allowed a group representing the commercial collectors to intervene in the case – and that group, the Pet Industry Joint Advisory Council – last month filed a motion asking the judge to stay enforcement of his order. A hearing on that motion was set for November 30.

The motion for stay indicates that the council intends to appeal the judge's order on the grounds that its members have suffered an unconstitutional taking of their means of livelihood, will be irreparably harmed if it is not stayed, and have had their due process rights violated. The "balance between harm to fishers, which is very real and happening now, and harm to fish, which is unsupported by science and may never occur, strongly favors a stay," the council argued in its motion.

In addition to the stay, the council is asking the judge for a final judgment, since without that, the council "cannot appeal the court's resolution of [the plaintiffs'] claims." And if Crabtree does not grant that request, the council asks that he "grant PIJAC leave to file an interlocutory appeal."

Maha'ulepu Award: The Friends of Maha'ulepu, whose federal Clean Water Act complaint against the Kaua'i dairy owned by Ulupono Initiative resulted in a consent decree last May, has been awarded more than half a million dollars in fees for attorneys and expert witnesses as well as court costs.

The Friends filed their complaint in June 2015. Following the consent decree, the group sought to recover costs. On November 13, U.S. Magistrate Judge Kenneth Mansfield entered his order. Although he discounted the hourly fees sought for many of the individuals on the plaintiffs' legal team, the reimbursement for their attorney fees still came to nearly $407,000. An expert witness for the Friends was awarded more than $79,000. Costs associated with the litigation were set at just over $20,000.

The dairy had argued against the award of costs, arguing that the settlement was, in fact, a "nuisance settlement" and that the plaintiffs' success was "de minimis." The court rejected this.

Among other things, the consent decree requires the dairy to give $125,000 to the Makauwahi Cave Reserve to support its work. It also bars the dairy from any land disturbance activities that might result in runoff.

Quote of the Month

" Where do we decide what is good for Hawai'i instead of what is good for ourselves? I'm saying that for both sides: for taro farmers and A&B."

— Keone Downing
Land Board

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Simmering Dispute Over Access At Pepe'ekeo Boils Over at Hearing

The issue of public access along the Pepe'ekeo shoreline, about 10 miles north of the Big Island town of Hilo, has been contested for two decades or more. No sooner does it seem to be settled than it flares up again. The flash point this time – as on several past occasions – is the entry to a gated subdivision, at a lot owned by Hilo Project, LLC, whose two members are Gary Olimpia and Scott Watson, and also by Watson individually. Watson is a builder who has run up against county Planning Department requirements numerous times over the last decade; Olimpia is a California lawyer.

The most recent incident resulted in the county issuing a notice of violation in late August over blocked access. Olimpia and Watson contested the violation. Their appeal was heard by the county's Board of Appeals at its meeting on November 9. After a day-long meeting where that appeal was the only item considered, the outcome was anticlimactic: the board merely kicked the can down the road.

A Short History

When most of the coastal lands in the area were owned by the sugar subsidiary of C. Brewer, fishermen were freely allowed to use plantation roads and trails to get to the water. Once the plantation closed in the mid-1990s, access continued for another few years until a new owner, Continental Pacific, proposed developing the prime area along the coast into an upscale, gated subdivision.

Following numerous community meetings and negotiations, a plan for public access to the shoreline and also to two small cemeteries in the area was developed. It was incorporated into the Special Management Area (SMA) permit No. 450 issued as a condition of the subdivision; both preliminary and final subdivision maps identify the easements for public parking as well as for pedestrian shoreline access.

Since at least 2012, however, Watson and Olimpia have sought to relocate the pedestrian easement. The foundation for their proposed 7,200-square-foot "Pepe'ekeo Palace" extends to the very edge of the easement; according to a site plan Hilo Project delivered to the county, the eaves of the proposed house will extend over the easement. Unless the access is rerouted, future homeowners could have their ocean views from the marble-tiled lanai interrupted by fishermen and hikers just inches away, beating a path to the shore.

Not only does the house site extend into the pedestrian easement, it also encroaches well into a 40-foot-wide setback from the top of the small pali, or bluff, that rises up from the ramp leading to the water's edge. That setback also was established as part of a condition of the subdivision permit.

The legal pedestrian access across the Hilo Project lot goes under the machinery pictured here and through a gate. Although the gate is unlocked, the path is overgrown and practically impassable.

As *Enviroment Hawai'i* has reported, starting in 2012, shortly after Watson began foundation work on the house, the pedestrian access was "temporarily" relocated by him so that it now runs north of the lot, along a paved drive that Watson has poured, joining up with the coastal path a couple of hundred feet from where it officially lies. This is the path the public has been using since then. The legal access has been allowed to become overgrown and a locked gate in a fence around the construction site had until recently prevented the public from following the easement as it is described in deeds and subdivision maps.

A Stalled PCR

According to Steve Strauss, attorney for Hilo Project, Olimpia made the call in June to close off the rerouted shoreline access out of frustration with the county not having approved his proposed parcel consolidation and re-subdivision (PCR). Watson and Olimpia have claimed that the original lot boundary was drawn in error and that the PCR is required to correct that mistake.

In addition to fixing that alleged error, the proposed PCR would make the so-called temporary access permanent so that it follows along a driveway Watson, anticipating approval of the PCR, poured on property owned by his neighbor to the north, Continental Pacific. In return for allowing the access to be relocated onto its property, Watson and Olimpia have offered Continental Pacific a similarly sized slice of land nearer to the coast.

In addition, the PCR would move further inland the mauka boundary of the Hilo Project parcel, shifting it toward the road over land owned by the Pepe'ekeo Point Shoreline Association, representing subdivision homeowners. The PCR would also add more than half an acre to Watson and Olimpia's lot, increasing its size to 1.753 acres, mainly by folding the shoreline ramp to the sea into their parcel.

The PCR application has been stalled for years. One of the hold-ups mentioned by Strauss has been the series of violations that Watson and Olimpia have racked up since 2012. The PCR application can't be processed until the violations are resolved. It is also unclear if the neighboring owners have properly given their consent to the proposed boundary amendments. While they had years ago given their consent to the PCR sought by the lot's previous owner, as recently as last month, the homeowners' as-

The legal pedestrian access passes in front of the lanai area of the proposed house, indicated by the forms.

sociation rejected Strauss's claim that "there exists no dispute between the association and Hilo Project."

Strauss testified that "because the PCR was stuck, the owners said we can't keep it open anymore," referring to the pedestrian access along the driveway.

On June 26, Strauss delivered a letter to the Planning Department requesting a "date certain" when the PCR would be approved. Otherwise, "the public access will revert to the legally established location," the letter stated.

By July 11, access down the driveway had been closed off, Watson had erected a fence on the homeowner association land fronting the Hilo Project lot, and the gate in fencing around the construction site remained locked. In short, there was no way, legal or otherwise, for members of the public to get to the shore.

The Notice of Violations

After visiting the site, the Planning Department issued a notice of three violations to Hilo Project and the homeowners' association on August 24. The department found that Hilo Project had illegally blocked public access by 1) stacking tree trunks within the easement, 2) erecting a hogwire fence over the homeowner association property, and 3) locking an interior gate. The landowners were required to remove the new hogwire fence, clear vegetation and debris from the legal access route, and keep the now-locked gate open. Planning Department director Michael Yee assessed a fine of $1,000 for blocking public access and ordered corrective action to be taken by October 1. After that, he wrote, "Daily fines of $1,000 per day shall begin to accrue … if the violation is not corrected."

In his appeal, Strauss argued the hogwire fence had been cut to allow the public through, so that this was no longer at issue. Also, he conceded that his clients had locked the interior gate and offered to have his clients pay a fine of $250 in settlement of that.

As for the logs stacked across the legal pedestrian easement, Strauss argued that the county is barred from pursuing that as a violation. A deal he struck with then county planning director B.J. Todd back in May 2013 prevents the county from citing this as a violation, Strauss claimed.

The county had knowledge of the logs as early as March of that year, he stated. "By agreement between Hilo Project, LLC, Scott Watson, and the Planning Department May 6, 2013, the Planning Department declared that it had notified landowners of all known or suspected violations of county law, regulations, and rules by landowners with regard to the subject property as of the date of that agreement. … The Planning Department cannot now lawfully claim that this pre-existing condition constitutes a violation," he told the board.

Michael Kagami, the deputy corporation counsel representing the Planning Department at the BOA meeting, disputed this.

"It sounds to me they're admitting it's a violation. The logs are there, blocking public access. The only disagreement is, does the agreement in 2013 prevent the department from assessing a fine? … The settlement agreement just doesn't cover access. And nowhere in the agreement does it say if it's a violation now [in 2013] we can't pursue it in the future," he said.

Nonetheless, Strauss went to great lengths to get Darrow, the staff planner, to acknowledge that the logs had been in the warehouse foundation area of the easement since at least 2012, when their presence was noted in an archaeological survey.

"There's no dispute that the photos of debris shown [in the survey] existed as of February 2013," Strauss said, asking Darrow for confirmation.

"Correct," Darrow replied.

Strauss then pointed to language in the 2013 agreement stating that the planning department had "notified landowner of all known or suspected violations of county law, regulations and rules by landowner to date."

"Isn't it fair to say that if the county considered [the logs] to be a violation in that area and already had notice of it in 2013, it never notified the owner at the time of entering the agreement that it considered it a violation?" Strauss asked Darrow.

Darrow: "I would disagree."

Strauss: "The county didn't notify us in 2013, did it?"

Darrow: "I notified you in 2012, which was prior to this agreement."

Strauss: "So … there's no dispute that the county was – if it ever considered this a violation of public access, it didn't consider this at the time she [Leithead-Todd] signed" the agreement.

Darrow: "You got the notice of violation four years later."

A Secret Easement?

In an effort to explain to the BOA how the messy situation developed, both Watson and Olimpia claimed they had no knowledge of the SMA permit for the subdivision and the public access easement across the property until after they purchased it. Watson said that the SMA permit wasn't in any public record.

Olimpia testified that before he purchased the property in February 2008, he went to the title company and had all public records pulled. "I looked at those, looked at the CCRs [covenants, conditions, and restrictions of the subdivision association]. There was no reference to any settlement agreement between Continental Pacific and the county. I went to the Planning Department and asked to pull all the records [for the lot].

"For a day and a half, I went through every box. Nothing. No reference whatsoever to that settlement agreement. I wasn't pro-

The legal access across the Hilo Project lot passes through the open gate, barely discernible through the overgrown vegetation in this photo.

vided that settlement agreement. I had no knowledge of that settlement agreement.

"I purchased that property from good friends, Mr. and Mrs. Alderson. They had no knowledge of that settlement agreement. The only document I had was the subdivision map," he said. This, Olimpia claimed, did not show the pedestrian easements.

Deputy corporation counsel Kagami pressed Olimpia on this point. "Did you have any knowledge of SMA 450?" Kagami asked.

"No, I never knew it existed. It wasn't in any of the public records I went through – a couple thousand pages," Olimpia answered, going on to say: "It was in a sealed file that later I was told about after all the problems."

Kagami then asked, "With respect to public access, wouldn't that be in the deed?"

"It is not," Olimpia replied. "It's only in that settlement agreement, [SMA permit] 450," which, he said again, he never received.

BOA member Steven Hirakami seemed incredulous that mention of the easements would not be included in the deed. "You state this easement is not in the deed?" he asked Olimpia.

"That's correct."

Staff planner Darrow was then questioned about the setback and easements.

Kagami: "With respect to SMA 450, is that a public record?"

Darrow: "Yes, it is."

Kagami: "Can you address why Mr. Olimpia did not have access to the easement record?"

Darrow: "I can't say what's in his deed, with respect to documents in the Bureau of Conveyances. But a simple check of the TMK [tax map key] of the property or subdivision that created the parcels would identify the public access easement on his property as well as for the entire subdivision…."

Kagami: "So the public access easements we're talking about today, they're in the subdivision maps?"

Darrow: "Further than that, when SMA was approved, it was for the 11-lot subdivision, which parcel 151 [the Hilo Project lot] is a part of. That subdivision identifies those public access easements."

Strauss asked Olimpia whether Darrow was correct about the easements being identified on the subdivision map.

"He's wrong," Olimpia said. "The subdivision map does not describe any public access. I'm a lawyer, I'm not going to tell you something that's there isn't there."

Three hours into the meeting where the Hilo Project was the only substantive item on the agenda, the Board of Appeals broke for lunch, but not before asking Planning Department staff to track down the property deeds as well as the subdivision maps.

About an hour later, when the board reconvened, Darrow distributed the February 2009 deed conveying the final 25 percent of the property from Richard Alderson to Hilo Project and the later, September 2009 deed transferring ownership from Hilo Project to Hilo Project and Scott Watson.

In both deeds, there are clear references to the parking, pedestrian, and other easements.

Nor do the subdivision maps support Olimpia's claim. The deeds reference a map prepared by Ross Tanaka. That map, which Darrow presented to the BOA, was a preliminary subdivision plat map.

Darrow also brought with him a copy of the final subdivision plat map.

Strauss and Olimpia attempted to make much of the fact that the deeds refer to the Tanaka map – instead of the final subdivision map – and suggested this could explain why Olimpia had no knowledge of the pedestrian easement.

In fact, the pedestrian easement is identical on both maps, which clearly show where the easement enters the Hilo Project lot from the parking area and ends up at the coast.

Wrapping Up

The four members of the Board of Appeals present at the November meeting seemed puzzled by the obvious acrimony among the parties and the apparent inability of Hilo Project and the county to resolve not just access issues but those involving setbacks and the proposed parcel consolidation and re-subdivision as well.

Kagami replied that the county had attempted to come to a resolution on the access issue as recently as October. "From the Planning Department perspective, there was an agreement to have driveway access. The department wrote a letter and sent it to Mr. Strauss. Mr. Strauss didn't agree to it. So we're in a position where that's what we said okay to, but they didn't want it."

Strauss ascribed the problems to people in the Planning Department who had an animus against his clients. "The county has used this violation to leverage my client as they've used prior violations to leverage my client," he said. "It's like whack-a-mole. And I'll tell you why. There are persons in the Planning Department who hate this guy, Mr. Watson. That's the history of why these things keep popping up after years and years.

"So you enter into negotiations with the planning director, and then he's gone. … We still hope we can solve globally all issues with Mr. Yee and provide that access. But we're being asked to provide that access without them moving forward on our lot consolidation. What they don't tell you is they're trying to negotiate access with Continental Pacific. You do have persons inside the Planning Department that don't want this project built."

The Board of Appeals had just four of its authorized seven members present at the November meeting and under its rules, all four, as a majority of its authorized membership, had to agree to pass any motion. But in the event that did not occur, the board's rules allow for the chair to continue the hearing to a meeting where more members are available to vote.

Deputy corporation counsel for the board, J Yoshimoto, explained: "The board rules provide, in this case, because we only have four votes, and if we don't get this, then the board chair has discretion to continue to a meeting where we have more… If you decide not to defer the petition, then Mr. Strauss can appeal to Circuit Court. The violation remains."

In the end, the board voted three to one, with chair Dean Au casting the dissenting vote, on a motion to dismiss the violations. Au then exercised his option to have the matter heard again by the Board of Appeals. It's scheduled to come up at the board's January meeting. ***—Patricia Tummons***

For Further Reading

Environment Hawai'i has published numerous articles on this issue since December 2012. Here are a few:

- "Shoreline Easement Lost as Builder Racks Up SMA Violations," December 2012;
- "Hawai'i County Sends Violation Notices to Builder over Construction at 2 Sites," January 2013;
- "Hawai'i County Is Challenged In Court Over Ability To Determine Coastal Setbacks," June 2013;
- "Hawai'i County Keeps Negotiating with SMA Violator, Despite Court Ruling," March 2014;
- "Hawai'i County Panel Refuses to Approve Change in Setbacks for 'Pepe'ekeo Palace,'" October 2014.

Bat from page 1

such wind farms. "I suppose they chose to run the risk that they would not take any endangered species. Anyway, there is a clear problem in our state with bat take and lack of appropriate mitigation," he said.

Sole Surrogate

Izu's main problems with the HCP revolve around its treatment of bat takes and mitigation. To start, she took issue with it estimating the maximum possible number of bat takes from the nine turbines using data from only one wind farm, the Kahuku Wind Project, and assigning a set amount of expected kills to each proposed turbine based on the historic level of take at the Kahuku facility, which has 12 turbines.

"Because the fatality calculation is based on an average per turbine and then multiplied by the number of turbines proposed by NPM [Na Pua Makani], it appears that NPM presumes that the number of WTGs [wind turbines] in a project is irrelevant. If the number of WTGs is irrelevant, NPM fails to explain why its analysis was limited to data from the Kahuku Wind Project and did not consider fatalities per WTG from other wind energy projects in Hawai'i," she wrote, adding that the company should have analyzed bat mortality at other wind farms that have been operating longer than the Kahuku project.

Izu also found that the plan failed to assess whether its taller turbines, with longer blades, would kill more bats than the Kahuku facility's turbines. The turbines there reach a maximum height of 128 meters, while NPM's turbines would reach 200 meters.

In contending that there is no direct correlation between turbine height and bat take, NPM relied on an article in the *Journal of Wildlife Management* that found no relationship between bat mortality/turbine and turbine height. However, Izu pointed out, the authors highlighted the fact that they compared turbines that weren't very different in terms of blade length. Turbine heights in that study ranged between 117 meters and 136 meters, a difference of 19 meters. The difference between the Kahuku project's turbines and NPM's is more than 70 meters.

What's more Izu wrote, a 2016 article titled "Impact of Wind Energy on Bats" concluded that numerous studies support the hypothesis that the taller the turbine, the greater the number of bat fatalities.

"Although this article was published after the final HCP had been drafted, the article cited to studies conducted in 2007, 2008, and 2009 regarding the relation between turbine height and bat mortality," she wrote.

For example, a 2007 publication, "Variation in bat and bird fatalities at wind energy facilities: assessing the effects of rotor size and tower height," concluded that replacing older, smaller turbines with fewer larger ones may result in increased numbers of bat fatalities, she wrote.

"In relying on the Kahuku Wind Project as a surrogate for the project, Applicant failed to consider the difference in turbine height in estimating take for the project. For example, although the WTGs at Kawailoa [another O'ahu wind farm] are taller than Kahuku's (but still not as tall as the maximum proposed for the Project) Applicant elected to use data solely from Kahuku and not Kawailoa. Contrary to Applicant's contention, the best scientific data does not support the hypothesis that there is no correlation between turbine height and take," she wrote.

PHOTO: USGS

Hawaiian Hoary Bat

"Because very little is known about the population status of 'ope'ape'a (estimates range from a few hundred to a few thousand), and given the fact that take of 'ope'ape'a by wind energy facilities may have been underestimated in the past, a robust analysis of potential take is critical," she continued.

She concluded that NPM's sole reliance on the Kahuku Wind Project as a surrogate and its failure to consider impacts of turbine height resulted in an estimated take in the HCP that was not reliable enough for the Land Board to determine that the Na Pua Makani turbines would not jeopardize the continued existence of the bat.

Cut-In Speeds

Studies have found that curtailing the turbines during low wind conditions can drastically reduce bat fatalities. Normally, the speed at which wind turbines start to turn — the cut-in speed — is three to four meters per second. To minimize the killing of bats via blade interactions, NPM proposed in its HCP that turbine blades start spinning only when winds are blowing at five meters per second. Otherwise, the blades would be feathered into the wind. This practice is known as low wind speed curtailment (LWSC).

NPM proposed practicing LWSC from March to November between sunset and sunrise.

"In addition to the intended benefit of reducing bat fatalities, low wind speed curtailment will reduce the risk to Newell's shearwaters, which could transit the Project at night April – November," the plan stated.

The Department of Land and Natural Resources' Division of Forestry and Wildlife recommended in its December 2015 Endangered Species Recovery Committee Hawaiian Hoary Bat Guidance Document that a minimum cut-in speed of five meters per second be employed by wind farms, "increasing to a higher cut-in speed through adaptive management if the rate of bat take is higher than initially expected."

Izu seemed to think that there was sufficient scientific evidence to support a requirement that the cut-in speed should be even higher. She noted that a study conducted at a wind farm in Indiana demonstrated that bat casualty rates were "significantly different between cut-in speeds raised to 5.0 m/s (50 percent reduction in overall bat mortality) versus turbines with cut-in speeds raised to 6.5 m/s (78 percent reduction in overall bat mortality)."

Even DOFAW biologist Scott Fretz testified during the contested case hearing that curtailing wind production at higher speeds could reduce bat take, she wrote.

She pointed out that under state law, NPM was required to minimize and mitigate the impacts of the take to the maximum extent practicable.

"Although studies to date are inconclusive as to whether there is a significant difference in minimizing bat fatalities when the cut-in speeds are increased from 5 to 6.5 m/s, there is some evidence that it does. Conversely, there is no evidence that cut-in speed of 5 m/s is more effective in minimizing impacts to bats than cut-in speed of 6.5 m/s. Moreover, the inferences are that curtailing wind production at higher speeds could reduce bat take. Therefore, the best scientific knowledge currently available suggests that increasing cut-in speed to 6.5 m/s, rather than 5 m/s, would minimize impacts to the maximum extent," she wrote, adding that NPM failed to provide evidence that

BOARD TALK

Tour Operator is Fined $70K For Damage To Historic Wharf, Conservation District

Simon Velaj didn't seem to think it was that big of a deal. In late June, without permits of any kind, he had taken a backhoe to features of a wharf built in 1916 at Punalu'u black sand beach in Ka'u, Hawai'i, causing some damage to the area and angering several locals who later reported him to the Department of Land and Natural Resources. Velaj claimed he didn't touch any pilings and was just removing hazards, such as abandoned car batteries and protruding metal, from the shoreline area to make it safe for future customers of his tour boat company, Hang Loose Boat Tours, LLC.

Others, however, including state officials, seemed to think he might have actually been trying to build a new ramp to accommodate his 24-passenger boat so that it could launch directly from private land owned by SM Investment Partners (a.k.a Roberts Hawai'i), which had allowed him to use its land. The nearest boat ramp may have been too steep, a report by the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL) suggests.

In one afternoon, Velaj appeared to have not only damaged historic sites, but also areas within the state Conservation District. So at the Land Board's October 27 meeting, OCCL administrator Sam Lemmo recommended that the board fine Velaj $15,000 for unauthorized grading, disturbance of land, demolition and alteration of existing structures, and causing a permanent change to land in the Conservation District. Lemmo also recommended that Velaj pay an additional $2,000 to cover administrative costs. What's more, the state Historic Preservation Division (SHPD) recommended fining him $40,000 for damaging four historic wharf features: 1) a concrete footing/ pad with two large bolts, 2) a concrete foundation, 3) a rock retaining wall, and 4) a concrete pillar; $10,000 for the injury to the historic feature as a whole, and $2,165.52 in administrative costs. In total, the penalties proposed by the two DLNR divisions came to $69,165.52.

Concerned about soil Velaj had placed near the water, the OCCL asked Roberts Hawai'i — one of the largest and oldest tour companies in the state — to clean up the material, which Velaj later did on the company's behalf.

When it came time for the Land Board to question staff, the first thing board member Stanley Roehrig asked Lemmo and SHPD's Alan Downer was if they had had any discussions with the Department of the Attorney General to determine whether any individuals or entities besides Velaj might be responsible for the damages. Neither had.

"I think Mr. Velaj was properly cited, but I'm concerned we have not considered the bigger picture of the entity that hired him," Roehrig said, adding that the fact that Velaj had been required by the landowner to have insurance coverage of up to $2 million suggests that "the landowner had full knowledge this was going to be a controversial matter and it was a matter that was going to be hotly contested by the local people."

Roehrig continued that the Sea Mountain golf course adjacent to where Velaj would be launching his vessel is owned by a partnership

PHOTO: DLNR

One of the damaged pillars that were part of the historic Punalu'u wharf in Ka'u.

increasing cut-in speed to 6.5 m/s is not practicable.

"By providing for LWSC at 5 m/s, instead of 6.5 m/s, the HCP fails to minimize impacts to 'ope'ape'a to the maximum extent practicable, and, therefore, may not be protecting or maintaining the habitat used by 'ope'ape'a," she concluded.

Mitigation

Finally, Izu addressed the plan's failure to come up with adequate mitigation steps as well as measures of success. Under the plan, NPM proposed taking a total 85 bats over 21 years. Mitigation measures (Tier 1) would be implemented if and when total take reached 34 bats. Additional measures (Tier 2) would be taken should another 51 bats be taken.

Tier 1 measures included the provision of funding for bat research and implementation of habitat restoration measures and associated monitoring at a mitigation area at Poamoho Ridge on O'ahu. Tier 2 measures included the provision of more money for more research and mitigation and monitoring at Poamoho. Mitigation at Poamoho included fencing and removal of feral ungulates and invasive vegetation, among other things.

Izu stated that with bat mitigation measures in general still in their early stages, it was premature to determine whether NPM's proposals would be a net benefit to the bats.

During the 21-year term of the take permit covering the wind farm, "research efforts may conclude that protecting habitats other than Poamoho Ridge may be more effective in the survival of 'ope'ape'a on O'ahu, especially as current knowledge indicates that 'ope'ape'a use a variety of different, including disturbed, habitats," she wrote. Should that become the case, the HCP lacks adaptive management strategies that would enable revisions in NPM's mitigation plans, she added. What's more, she stated that the plan is silent as to what happens if pigs, goats and invasive plants are not removed from Poamoho to the extent and in the timeframe provided in the management plan.

Since the HCP lacks an effective adaptive management strategy, as well as any meaningful measures of success, the HCP does not meet state law requirements with respect to the bats, she wrote.

Birds

While most of Izu's concerns about NPM's habitat conservation plan related to its treatment of bats, she also found fault with its proposed mitigation for threatened and endangered birds. For Hawaiian waterbirds (duck, stilt, coot, and moorhen), NPM proposed to construct fences and erect informational signs at wetland habitats in Kailua, located about an hour southeast of Kahuku. It also proposed to support public education and monitoring through

"apparently owned by the Iwamoto family that runs Roberts tours," which potentially stood to benefit from Velaj's operation. Roehrig noted that the license agreement between SM and Velaj specifically allows for parking and launching a vessel to conduct lava viewing tours, which shows that the landowner was fully aware of Velaj's intent to "streamline the shoreline" so he could get his boat in. "To suggest they didn't know the nature of it I don't think is accurate," Roehrig said.

He asked Lemmo and Downer why the landowner was not considered for fines as well. "For me, Velaj … he's just the boots on the ground. The landowners are equally responsible for his conduct. … They got off scot-free," Roehrig said before suggesting that the AG's office investigate the matter and make its own recommendation to the Land Board.

Velaj testified that he never touched any pilings or damaged any sites with the backhoe, contrary to the allegations that had been made.

"If they can prove it, I want to see it. They want $10,000 for one piling. That is absolutely retarded," he told the board. "All I'm trying to do is work. What is the problem? I don't understand. They requested a $2 million policy. It requires me to make it [the launch area] clean so they will insure me. I mean, c'mon. I ask you to drop this case and let me move on with my life. That's it," he said.

Board member Keone Downing, for one, didn't seem interested in simply dropping the case. He asked Velaj, if a $10,000 fine per piling was ridiculous, "what's a fair price?"

"None. I didn't touch it," Velaj replied.

Downing: "I didn't ask you that. … What would be a fair price for a piling if $10,000 is ridiculous?"

Velaj: "I don't know what a piling is worth in that area."

Downing: "So you don't know what it's worth, but $10,000 is ridiculous. … I'm not saying you did anything. … There needs to be a price, not, 'I didn't do it.'"

Roehring continued to try to pin down SM's role in the affair. He pointed out that Hawai'i County had fined SM $15,000 for some of the same work, but that was under appeal. He asked Velaj what kinds of discussions he had with the landowner before starting work with the backhoe, and who he talked to. Velaj responded that he had spoken to Jean Fujimoto, the person who gave him the lease.

> *"Is this the guy we want to ensure the safety of people near an active lava flow? … He continues to be defiant today."*
>
> ***— Keoni Fox***

"I told them I would bring a machine in there and clean it up. They knew I could not work if I didn't clean it up. I had used car batteries. I took tons of stuff … I'm a 5-star company in Kona. I'm a professional, hard-working guy. … I want to make sure my customers don't get hurt and not trip on batteries," Velaj said.

"You did tell them you would use heavy equipment," board member Chris Yuen tried to confirm.

To this, Velaj disputed that the backhoe was "heavy equipment."

"My little truck is bigger than the backhoe," he said.

Yuen asked Velaj if he was trying to make another boat ramp.

"Absolutely not," he replied, explaining that he was going to use the ramp that was there, but wanted to remove four pieces of metal that were sticking out.

"That's all that was removed. … Yes, the locals got upset," he said.

Velaj's apparent dismissiveness of the fact that he had altered the site seemed to prompt board chair Suzanne Case to ask if he understood the Conservation District and historic preservation laws that he had violated.

"Now I do. I never was told it was a conservation place, it was a sacred or historical place. I never was told. To me, it was a private property rented to me. … If I had to do it all again, obviously I would not be there," he replied. Still, he added, "those two pilings, pins, that I touched … There was, under the grass, metal sticking out. Now people could walk around.

"I will pay for four pins. I think they're worth five bucks apiece. … I'm not gonna pay for anything I didn't touch," he said.

Velaj's seeming lack of remorse also struck island resident Keoni Fox, whose family is from Ka'u. After visiting the site on June 24, Fox told the board, "it was obvious he intended to create a boat ramp," given the debris clearing and grading that had been done. He added that the existing ramp is too steep and the waters are too shallow for Velaj's boat, which is 34 feet long.

"He told people he was building a new boat ramp," he continued, contradicting Velaj's earlier statement.

As to Velaj's professed ignorance of the applicable laws in this case, Fox posed this question: "Let's assume he didn't know about laws. Is this the guy we want to ensure the safety of people near an active lava flow? … He continues to be defiant today."

Fox added that with Ka'u becoming a hot spot for tours, helicopters, and development, there needs to be strong enforcement of land use regulations.

The OCCL's Lemmo said that when he prepared his report to the board, he didn't feel he had evidence at the time to go after the landowner, but that could certainly change if his office found information that SM authorized Velaj to conduct illegal work. "I'm a little bit surprised what he said about him telling them what he's doing. That's interesting," Lemmo said of Velaj's testimony that day.

Yuen made a motion to approve the OCCL's and SHPD's recommendations. "This is a serious violation and we need to treat it seriously. In 2017, we can't accept the idea that someone will go out and grade the

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the funding of a part-time biologist. Under the plan, the mitigation would be deemed a success if the fences were constructed in a timely manner and funding were provided for maintenance and the biologist.

"These actions, however, cannot be said, when achieved, to contribute significantly to the protection, maintenance, restoration or enhancement of ecosystems, natural communities, or habitat types," Izu wrote.

She added that the plan also does not discuss any adaptive management strategy "in the event that fencing, monitoring and public education are not successful in reducing the number of predators entering the marsh, the amount of trash in the parking lot adjacent to the marsh, or increasing the nesting opportunities within the marsh."

In fact, she concluded that most of the measures of success included in the plan were not conducive to adaptive management strategies. "For example, by contributing to a pool of money for 'a'o [Newell shearwater] conservation research or projects to be carried out by USFWS, there is no adaptive management strategy under the HCP in the event that the management project that was funded turns out to be ineffective," she wrote.

(For more background on this issue, see our February 2017 cover story and sidebar, as well as our December 2016 and January and November 2017 "Board Talk" columns.)

— Teresa Dawson

Conservation District without there being a serious violation," he said.

Roehrig seconded the motion but again stressed his desire to see a broader investigation of all parties that might bear responsibility.

"Figure out who else should have got fined and get everybody and not just the hanahana man on the backhoe. There were other entities up the food chain. It's a big golf course. … It's a multi-million dollar operation, not small potatoes. If we're going after the people on the backhoe, we have to show the public, be transparent, and go after everyone," he said.

Downing agreed and suggested that the department seek the AG's opinion on whether the landowner is liable.

The board unanimously approved Yuen's recommendation.

"I will take this to federal. This is not legal," Velaj warned before he stormed out.

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Three Protesters Arrested After Disrupting Meeting

It's part of the job," one Department of Land and Natural Resources enforcement officer said to his colleague on the morning of October 27, shortly before both moved in to help their fellow officers carry away a protestor stationed on the ground outside the Kalanimoku building in downtown Honolulu, where the Board of Land and Natural Resources was scheduled to meet.

The DLNR's Division of Conservation and Resources Enforcement officers arrested three men that day — Kaleikoa Ka'eo, Chase Kanuha and Andre Perez — for disorderly conduct at the start of the Land Board's meeting. The three men, as well as a small cadre of supporters, had come to the meeting to call for the resignation of member Sam Gon, senior scientist for The Nature Conservancy of Hawai'i and the board's designated expert in Hawaiian culture. (The law that establishes the Land Board – Section 171.4 of Hawai'i Revised Statutes – says that at least one member "shall have demonstrated expertise in Native Hawaiian traditional and customary practices." Although not a native Hawaiian, Gon has studied Hawaiian culture extensively, speaks the language fluently, and does have "demonstrated expertise" in Hawaiian practices.)

All three men had previously been arrested for trying to block telescope construction on mountains they and many other native Hawaiians consider to be sacred. Ka'eo was arrested earlier this year as he tried to stop a

Chase Kanuha (seated) and Andre Perez (standing in center) were two of the protesters arrested outside the Land Board meeting room on October 27.

mirror from being transported to the largely complete Advanced Technology Solar Telescope atop Haleakala on Maui. Kanuha and Perez were arrested on Hawai'i island during the 2015 protests against the construction of the Thirty Meter Telescope (TMT) on Mauna Kea.

Their opposition to Gon's presence on the board stems from the fact that he had recently voted with the majority of the Land Board to approve a controversial Conservation District Use Permit for the TMT, which, for the last five years, had been the subject of a contested case hearing initiated by several Hawaiian cultural practitioners and others.

> *"We demand we have a true kanaka, a true aloha 'aina represent our people on that board."* ***— Kaleikoa Ka'eo***

"We demand that Sam Gon step aside. … We demand we have a true kanaka, a true aloha 'aina represent our people on that board," Ka'eo said. Others chanted "Sam Be Gon. Sam Be Gon," and called Gon a "sellout."

After the Land Board meeting had ended, chair Suzanne Case, Gon's former boss at TNCH, issued a statement defending him.

"Sam 'Ohu Gon is held in the highest respect by innumerable people. As a scientist and as a recognized expert in native Hawaiian traditional and customary practices, Sam brings tremendously valuable perspective and integrity to the Land Board decisions. No Land Board member is appointed as a representative of or advocate for any particular group.

"It is disappointing and frankly offensive that some who disagree with the Land Board's recent decision on the TMT telescope choose to aim personally at 'Ohu or any board member. This is not peaceful protest. We must simply reject this kind of divisiveness in Hawai'i as well as nationally and globally, and practice respect in our public discourse no matter our views," she stated.

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Board Renews Permits For Maui Stream Diversions

For the second year in a row, the state Board of Land and Natural Resources approved four one-year holdover permits allowing Alexander & Baldwin, Inc. and its subsidiary, East Maui Irrigation Co., Ltd., to continue diverting up to 80 million gallons a day of stream water from East to Central Maui.

The board made its decision under Act 126 (2015 session), which the Legislature passed in response to a circuit court decision invalidating the revocable permits that had governed A&B's and EMI's diversions for more than a decade. Under Act 126, the board may grant up to three consecutive one-year permits to continue water diversions for which long-term dispositions are pending, so long as they are consistent with the public trust doctrine.

A&B/EMI is awaiting a decision on its May 2001 application for a 30-year lease for the four water license areas covered by the permits — Nahiku, Huelo, Honomanu, and Ke'anae. That application has been the subject of a contested case hearing that is still not resolved.

Before the Land Board can authorize a public auction for the lease, the state Commission on Water Resource Management must first decide how much water must remain in about two dozen East Maui streams that environmentalists and native Hawaiians have long sought to be restored. A&B must also complete an environmental impact statement for its proposed lease.

In the meantime, A&B has been trying to entice farmers and ranchers help the company keep its Central Maui lands in agriculture now that the sugarcane plantation run by its subsidiary Hawaiian Commercial & Sugar has closed down. It argues that although its current needs, and those of Maui County, for diverted water have been drastically reduced to about 20 million gallons a day (down from a historic average of 160 mgd), it must have access to much more than that to provide assurance to prospective tenants that they will have sufficient water.

At the Land Board's November 9 meet-

ing, A&B general manager for diversified agriculture Rick Volner, Jr., and retired EMI manager Garret Hew presented a new map of its proposed diversified agriculture plan for former sugarcane lands.

Since the closure of HC&S's plantation in December 2016, Volner said his company has met with nearly 200 parties interested in growing everything from coffee, to orchards, to biodiesel. A&B currently has 4,500 acres under lease or some kind of active operation and was in negotiations with possible tenants for another 15,000 acres. It also plans to provide 800 acres to the county to expand the Kula agricultural park, he said.

Volner assured the Land Board that A&B had complied with all of the conditions placed on the permits granted last year. Those included restoring streams identified for restoration by the Water Commission and not wasting any of the diverted water, among other things.

Representatives from the Maui mayor's office, the county Department of Water Supply, and various farming and ranching associations and companies all testified in support of renewing the permits. Some of them argued that it was critical that water continue to be provided to Central Maui to keep the island, and even the state, on its path toward food sustainability.

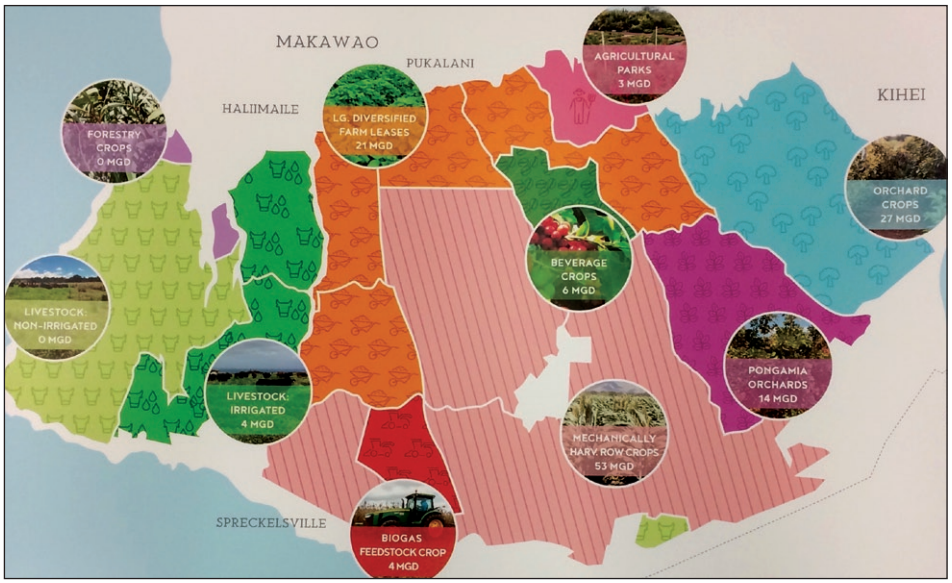
"The Department of Water Supply relies on stream water flows as an integral part for Nahiku, Makawao, Olinda, Pukalani, all of Upcountry," said DWS director Dave Taylor, noting that the 6 mgd A&B provides to the county directly serves more than 6,000 customer connections, and at times up to 10,000, as well as 31 farm lots at the Kula ag park.

"We have no other short- or medium-term alternatives for this water. … What I lose sleep over, if we don't have enough water to pressurize the system, there may be no water, no fire protection … It would be a public health crisis for the DWS. I flew over just to say that," he said.

To this last point, Native Hawaiian Legal Corporation (NHLC) attorney Camille Kalama, representing the contested case petitioners, pointed out that the circuit court decision invalidating the permits explicitly stated that the water the county uses would not be affected by the ruling, and that the Land Board is well aware of that.

Stream Restoration

With regard to last year's permit condition that certain streams be restored, Huelo resident Lucienne de Naie argued that it has not been met, at least with regard to the stream in her community.



GRAPHIC: A&B

Graphic depicts possible uses of A&B lands in Central Maui.

"We really need you to work with us to have some accountability. Most of the year our stream has been dry," she said. She claimed A&B was still waiting for permits to weld a steel grate that would enable more water to flow freely.

"You give permits with no enforcement. It is not a management situation anyone should be proud of," she said before urging the board to set firm deadlines for A&B to complete its applications to restore streams.

Former NHLC attorney David Frankel pointed out that the DLNR lacks a point person to oversee whether the holdover permit conditions are being met. He recommended that the board or its chair assign staff with the department's Division of Aquatic Resources to work with Water Commission and Land Division staff to ensure those conditions are being met.

"There needs to be better coordination among branches," he said. He added that the Land Board should also initiate a study — paid for by A&B — to monitor the streams where water has been restored.

"As unhappy as many of us were last year, we know more water is in streams. It's not perfect but it's better than it was … Why are you not doing this? You don't have the money. Make A&B pay for the studies. Why not make it a condition of the RP asking for a specific amount of money so you can monitor the quality of aquatic stream life?" he asked.

How Much?

Several testifiers, as well as some Land Board members, tried to pin down — or at least get a better grasp of — the amount of water A&B used last year and what it will need in the coming year, largely to no avail.

Board member Keone Downing asked a cattle rancher who's been on A&B's lands for the past several months how much water he uses. The answer at first was, "it depends," but, eventually, he admitted, "Honestly, I don't know."

Stephanie Whalen of the Hawai'i Agriculture Research Center testified that it didn't really make sense to assign a specific amount of water for the uses anticipated over the next year.

"Crops will change. Saying you'll need this much water is not realistic. … it really depends on the weather," she said.

De Naie, who is also with the Maui Tomorrow Foundation, estimated the company would need just 10 mgd to 10.8 mgd plus 6 mgd for the county's needs, if the board took into account only those lands for which A&B had signed contracts with tenants.

Wayne Tanaka of the Office of Hawaiian Affairs argued that whatever A&B's water needs, it was particularly important that the company explain why it hadn't used the 53 mgd of stream water that it diverts from its own lands, or the 70 mgd available from its own wells in Central Maui.

"There is nothing in this [Land Division] submittal on these alternative sources," he said.

He also pointed out that there appeared to be no need to issue permits for the Nahiku and Ke'anae license areas, as the board last year required A&B to comply with a July 2016 Water Commission order that the streams in those license areas be restored.

Tanaka, Kalama, and Frankel all called for meters to be installed on the stream diversions so that the Land Board could get a basic accounting of what's being removed so that it can determine whether the permits' prohibi-

tion on wasting water is being observed.

"We've asked repeatedly [for meters]. … The board's condition against waste can't be effectively monitored unless you know how much is diverted and used," Kalama said.

"You can have a flow meter above, below [a diversion], you subtract. It's not rocket science. It's aquatic science," Frankel said.

He argued that the board should reject the permit request because it didn't have enough information.

"How much did A&B use this year? Don't you think you should ask them? How much water do they need next year? This is a one-year RP (revocable permit). How much water in their greatest fantasy … will they need this year after pumping 70 mgd from its own wells?" he asked.

If the board chose to grant the permits, Frankel recommended that it reduce the maximum limit to 10 mgd "after they pump 70 mgd."

"Don't let us subsidize their profits. … It costs them money, a lot more money [to pump water]. … They certainly paid their officers enough money to afford to pump their own water instead of us paying for it," he said.

"Why should we leave it at 80 [mgd] instead of 20?" board member Stanley Roehrig later asked Volner, noting that there is a significant amount of suspicion among people who feel the water has been robbed from their watersheds.

Roehrig added that efforts on Hawai'i island to transition from sugarcane to diversified agriculture have met with limited success. "Some things succeeded and some things didn't," he said. The governor at the time had assembled a Kohala task force to oversee the transition and "solve all of our diversified ag problems." What actually happened was that few farms survived, despite the expenditure of millions of federal and state dollars, he said.

"This history of trying to find something new is not a really good one in Hawai'i," he warned Volner.

"We recognize that," Volner replied.

A Motion

In the end, board member Chris Yuen made a motion to approve the Land Division's recommendation to renew the holdover permits with the same conditions as last year, with some amendments.

First, he recommended that should the Water Commission issue a decision on the interim instream flow standards for about two dozen of the diverted East Maui streams, the Land Board's permit conditions should be revised so they are consistent with it.

He also amended the wording of a condition regarding the modification of diversions so that the movement of biota up and down the stream is not impeded, and added a condition that A&B provide a more specific report on progress on removing the diversions and fixing pipe issues before the end of this holdover period.

On this question of how much water A&B should be allowed to take under the permits, Yuen said he was satisfied with the conditions as they were proposed.

"We already have a limit. They have to make productive use of the water and there's no waste. That turned out to be 20 mgd," Yuen said.

He also adopted a recommendation made by Kalama, Frankel and others that A&B be required to clean up garbage and debris within the permit areas.

Kaua'i board member Tommy Oi seconded, but echoed sentiments expressed earlier by Roehrig that A&B should provide the board with more detail in the future.

"I would like to see in the next report more detail. … It just said they met the public trust doctrine. I would like to know how they met the public trust," he said.

Board member Downing ultimately voted in favor of the motion, but not before voicing his many concerns about the status quo.

For one thing, "if we are going to bank water waiting for something to happen, I don't think that's fair," he said.

He also lamented the paucity of information from A&B.

"Why do we have to come to A&B and ask for fulfillment of parameters?" he asked, adding that the company on its own should meet those conditions "for the people on Maui and not bring it to where we have people coming from Kula ag park thinking that they're going to lose water."

"We shouldn't be having to ask for information because, if it's the truth, everybody wins," he said.

"If this doesn't get cleaned up by next year, I'm going to be the biggest advocate for no holdover. … EMI can teach people how to do it … They're not going to starve Kula from water. They've got somebody living there that they care about," Downing said.

He fantasized that there may come a time when the water goes to a cooperative, rather than a corporation. "I don't know. Maybe it's just a dream. We gotta get to a point sooner or later; we got to sit down together and trust each other again."

Before casting his vote in favor, Roehrig told A&B's representatives, "You gotta make an effort to install meters. That's not rocket science. The computer age is well on us. You gotta show us some proof you're not fudging. It's gotta be objective because there's a lot of suspicion. We're going to have to know next year … because the last year, the third year, may be a zero."

"I have feelings that A&B shouldn't have the water forever on Maui. Maybe that's my bias. I'm not in favor of 80 mgd. I'm at 50," he said.

Despite some of the board members' reservations, the board voted unanimously to approve Yuen's motion. ***—T.D.***

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Green Infrastructure Agency Told To Pay Back Public Benefits Fee

Unhappy with the performance of the Green Energy Market Securitization program (GEMS), which has largely failed to meet its mandate to help make solar photovoltaic systems affordable to underserved communities, the Public Utilities Commission issued an order on October 26 requiring GEMS loan repayments to be applied toward the replenishment of the Public Benefits Fee (PBF) instead of being returned to the GEMS fund.

Principal, interest, and fees associated with the $150 million GEMS bond float have been paid with an assessment on customer bills that comes at the expense of the PBF. The PBF, which funds Hawai'i Energy projects, was praised by the PUC in its October order, which noted that the Hawai'i Energy Program has, to date, saved customers "over $1 billion in energy bill savings," with "every dollar of investment generating nine dollars in benefits."

The PUC noted that with loans of just over $5 million issued by last July 1, the GEMS program revenues totaled less than $1 million, while administrative costs have been $2.8 million. "Meanwhile," the PUC continued, "Hawai'i Energy has a continued track record of success."

"Residential ratepayers in Hawai'i pay $1.18 per month … for the GIF [Green Infrastructure Fee], which serves as the guaranteed source of money to repay the bondholders who initially funded GEMS. When the commission established the GIF, it reduced the PBF by an equal amount, so that ratepayers would not pay a higher bill as a result of the GEMS program. The commission did this with the expectation of quick repayment … predicated on HGIA's [Hawai'i Green Infrastructure Authority] projection that it would loan the entire $150 million of GEMS funds within two years and begin earning interest on that money," the PUC stated.

"If HGIA doesn't lend money, problems arise. Loans not issued cannot be repaid, and without loan repayment, there is no interest. If there is no interest, there is no money to replenish the PBF, no money to cover HGIA's administrative expenses, and no money to sustains the GEMS program. … In sum, if HGIA does not collect loan repayments, with interest, it cannot fulfill its obligation to repay the PBF offset, which ultimately puts ratepayers at risk of being forced to cover the reduction in energy efficiency program funding."

Gwen Yamamoto Lau
HGIA executive director

> *"The commission has a fiduciary duty to safeguard ratepayer funds, and to ensure that they are expended prudently." —**PUC***

HGIA was established with the expectation that it would make loans "expeditiously," but, the order continues, so far, HGIA has only loaned approximately 3 percent of GEMS funds. The practice whereby HGIA "pays its own administrative expenses before it returns money to the PBF jeopardizes energy efficiency programs," it added.

In its original order approving the GEMS program, the commission allowed HGIA to use loan proceeds to pay for administrative and financing costs before repaying funds taken from the Public Benefits Fee. But the commission in its October order found that the HGIA has not demonstrated the ability to replenish the PBF, and has, thereby, hindered Hawai'i Energy's work and caused electric ratepayers to suffer.

"The commission has a fiduciary duty to safeguard ratepayer funds, and to ensure that they are expended prudently," the order stated.

The PUC concluded that based on its findings, it "must act now to ensure that PBF funds are replenished."

In explaining how this is to be done, the PUC ordered the HGIA to transfer loan repayments annually as a credit to the PBF, "so as to replenish any reduction in collections of the Public Benefits Fee in that same year and any remaining underpayments from previous years that result from the offsetting of GIF collections.

An Update

Last month, we reported that HGIA was seeking PUC approval to use GEMS funds to support installation of photovoltaic equipment on a low-income housing project before that project was connected to the Hawaiian Electric Grid.

On October 10, the Public Utilities Commission determined that its initial order approving the GEMS program in September 2014 "does not preclude the HGIA from committing GEMS funds" to the project, known as Kahauiki Village. The PUC went on to require HGIA to file within 60 days of October 10 the fully executed utility connection agreement between HGIA, Kahauiki Village Development LLC, and the special purpose entity that is the designated borrower. ***— P.T.***