Volume 28, Number 8 February 2018

Environment Hawaiʻi

a monthly newsletter

Carrying Water

The plight of companies and individuals diverting streams under year-to-year permits was addressed by the Legislature two years ago, when it approved a scheme that was intended to set out a course for converting those permits to full-on, long-term leases.

As our cover story details, getting most of the permittees across the finish line to lessee status is proving to be a challenge, with the deadline for conversion rapidly approaching. And members of the state Land Board are urging the Department of Land and Natural Resources to do more to make it happen.

Also in these pages: Another close look at the state GEMS program; a look at fishermen and the licenses they need; and a recap of the Land Board's discussion of the threat of coastal erosion and flooding.

IN THIS ISSUE

Board Directs Land Division To Help Permittees, DHHL Meet Water Needs

In 2016, the Legislature passed a controversial bill that gave two dozen or so individuals and companies throughout the state with revocable permits to divert water a period of three years (and perhaps longer) to secure long-term leases from the Board of Land and Natural Resources. The bill was aimed at circumventing the implications of a Circuit Court ruling that invalidated water permits that had been renewed unamended for more than a decade to Alexander & Baldwin, Inc., and its subsidiary, East Maui Irrigation Co. Ltd.

While a few of the more well-heeled permittees have made strides to reach that goal — A&B/EMI, Hawaiian Electric Light Company, and the Kauaʻi Island Utility Cooperative (KIUC), for example — it became clear at the board's December 8 meeting that others, including farmers and ranchers, aren't any closer to reaching that goal than they were a year and a half ago.

Will any of them be able to meet the requirements for a lease — which may include an environmental assessment or impact statement, as well as a watershed management plan — before the three years are up? Will it even matter if they don't? With regard to the first question, Land Board members hashed out what could possibly be a path toward meeting those requirements in a timely manner and without extraordinary expense.

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PHOTO: USGS

A PVC pipe collects water from one of the irrigation tunnels that serve lands in Kaʻu.

Environment Hawaiʻi

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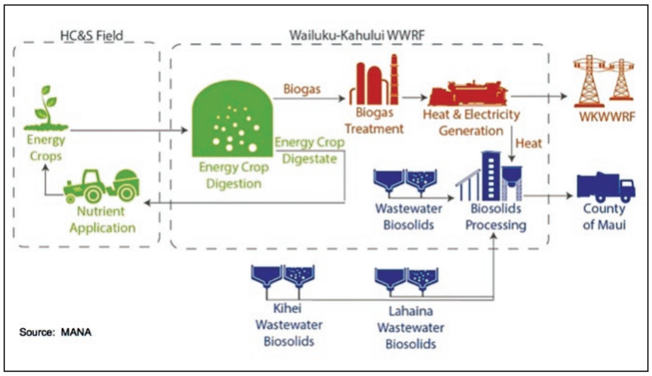
NEW AND NOTEWORTHY

Kahului Questions: A company that wants to use energy crops from 500 acres of Alexander & Baldwin land on Maui, produce biogas, and use the fuel to run a power plant that will provide electricity to Maui County's Kahului wastewater treatment plant has published a draft environmental impact statement (DEIS) for the facility.



Schematic of the biofuel power plant proposed for the Kahului wastewater treatment facility.

The company, Maui All-Natural Alternative, or MANA (a subsidiary of alternative energy giant Anaergia), has signed an agreement with the county that calls on it also to take sludge from all three Maui County wastewater plants — at Lahaina and Kihei, in addition to Kahului — and dry it out by use of waste heat and excess biogas. After drying, the DEIS states, the sludge "will be considered a Class A fertilizer that will be returned to the County of Maui for its use as a soil amendment."

But the DEIS is unclear on whether the plant will be linked to Maui Electric's grid. The main text says no, as do several letters written last fall in response to the EIS preparation notice and appended to the DEIS (including a letter to the Department of Land and Natural Resources' Office of Conservation and Coastal Lands).

But an appendix produced after those letters says yes. According to an air quality study by Trinity Consultants of Sacramento, bearing a date of November 17, the plant "will produce 800 kW of gross electricity on average, 480 kW of which will be sold to the utility and the remainder used on site." That would suggest the wastewater treatment plant demand is around 320 kW.

Jeff Walsh, Anaergia's director of business and development for Hawaiʻi and the Pacific, told *Environment Hawaiʻi* that the plant will not be producing any power for export and that the statement that it will, by Trinity, is "a misquote. … All power will be consumed onsite."

Elsewhere in the DEIS, there's the suggestion that the 800 kW won't even be sufficient to power the sewage treatment plant. In a letter to the Maui group of the Hawaiʻi Sierra Club, MANA's Jeff Walsh stated that the sewage treatment plant "will not be taken off the MECO grid. … During normal operations, the [wastewater treatment plant] will be supplied by both MECO and MANA power."

Comments on the DEIS are due by February 6. For more information and a link to the DEIS, see the Office of Environmental Quality website: *oeqc2.doh.hawaii.gov.*

Hu Honua Remand: The Intermediate Court of Appeals has issued a ruling in the appeal of the Hawaiʻi County Windward Planning Commission's decision in 2011 allowing the Hu Honua power plant to move forward.

The ICA rejected several of the arguments made by the plant's opponents but found in their favor in one key respect. At the time the amended Special Management Area permit was approved in 2011, Hu Honua had no stated plans to work in the coastal area or within the SMA more generally. However, an ocean outfall that jutted out from the face of the cliff fronting the plant was later discovered to be broken off at the cliff face.

During the contested-case hearing on the amended SMA permit, representatives of Hu Honua said they were continuing to investigate ways to address the collapsed outfall. But the Planning Commission made no finding of fact or conclusion of law to address this.

"Thus, because it is not clear what repairs or replacements will take place with regard to Outfall 001, Hu Honua did not make an affirmative showing that any work done will not conflict with the principles and purposes of the public trust doctrine," the ICA panel found. "Therefore, … the Planning Commission granted the amended SMA permit in violation of constitutional provisions."

The matter was remanded to the Windward Planning Commission with instructions that it should address the impacts to the shoreline from repairing or replacing the outfall.

Corrections: In our December "Board Talk" item on Maui water permits, we incorrectly stated that 2016's Act 126 grew out of the 2015 legislative session. Also, in our January cover story on Maui water issues, a caption erroneously stated that the photo depicted a stream gage in Waikapu Stream. In fact, the photo shows a gage on the Parshall flume flowing into Reservoir #1.

Quote of the Month

"I think people are going to walk from properties. People are going to create shell companies that are going to hold properties they think they're going to abandon."

— Chris Yuen, Land Board

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Environment Hawaiʻi is published monthly by Environment Hawaiʻi, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $65 individual; $100 non-profits, libraries; $130 corporate. Send subscription inquiries, address changes, and all other correspondence to
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Twitter: Envhawaii

Environment Hawaiʻi is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: Frances Officer

ISSN 1050-3285

COMMENTARY

From High Hopes to Sad Reality: GEMS' Repeated Hits to Ratepayers

The Public Utilities Commission has ruled on the matter of who should pay the costs incurred by Hawaiian Electric utilities when they service loans made from the Green Energy Market Securitization fund, or GEMS.

Hint: It's not the utilities.

Another hint: It's not the GEMS loan recipients.

Answer: Once again, it's Hawaiian Electric ratepayers.

Yes, the same people who are paying off the $150 million GEMS bonds are now being socked with the additional costs associated with a yet-to-be-approved method of on-bill repayment, called GEM$, that will allow people who receive GEMS-backed loans for photo-voltaic and other energy-saving technologies to pay off their debt through financing charges on their monthly electric bills.

In the "request for guidance on the on-bill repayment mechanism" that Hawaiian Electric filed on November 24, it argued the inequity of this approach: "the companies are wary of recovering such implementation costs and ongoing costs via their broader customer base for a program that will only be utilized by customers participating in HGIA's GEM$ program."

In an order approved by the commission on January 5, the PUC sided with the HGIA, determining that the Hawaiian Electric utilities "shall not recover costs associated with the GEM$ program directly from" the Hawai'i Green Infrastructure Authority (HGIA), which administers GEMS. "Instead, the PUC ruled, "the companies may seek to recover these costs as part of their revenue requirement, in a rate case."

The ruling came after negotiations between HGIA and Hawaiian Electric over implementation of the GEM$ program broke down last fall. As *Environment Hawai'i* reported in January, the matter of who should pay costs associated with on-bill repayment was just one of several areas of dispute.

Hawaiian Electric asked for clarification on disconnection, in the event that GEMS loan recipients don't pay their bills in full. The PUC instructed the companies to "follow their standard disconnection process."

On the matter of how payments should be allocated in the event that a ratepayer does not remit full payment for electric consumption and the GEM$ charge, the PUC stated that the GEMS loan repayments "shall have senior status over payment for electricity usage."

Hawaiian Electric had raised the issue of indemnification from harm that might arise from actions of Concord Servicing, the company that has contracted with HGIA to manage the GEMS loans. "The commission will not insert itself into any putative negotiations between the companies and Concord," the PUC ruled, "and the absence of a coordinating agreement between the companies and Concord shall not delay the implementation of the GEM$ program."

Hits on Ratepayers

In effect, the PUC decision on GEM$ charges — that they be borne by ratepayers — marks at least the fourth time that Hawaiian Electric's customers have been burdened with charges related to the GEMS program.

The first, and so far greatest, charge is the monthly Green Infrastructure Fee that appears on Hawaiian Electric utility bills. This goes to repay the principal and interest on the bonds that were sold in 2014 to underwrite the program. It also diverts money away from the beneficiary of the Public Benefits Fee, which underwrites Hawai'i Energy. (Hawai'i Energy is the private contractor that provides discounts for energy-efficient appliances and gives residents and businesses audits of their energy uses, among other things. It has a solid history of achievement in spurring reduced consumer demand.)

A second hit to ratepayers came when the 2017 Legislature diverted $46.4 million in GEMS funds — over one-third of the available balance — to the Department of Education. This is an interest-free loan, which means that the proportion of the interest payments on the GEMS bonds that would otherwise be paid by GEMS loan recipients will fall instead to ratepayers who are not directly benefiting.

The third hit is this: To restore funds diverted from the Public Benefits Fee, the PUC directed that amounts the HGIA receives as loan repayments have to first be applied to replenishing this fund. Only after that can HGIA use funds for its own administrative costs. This has been taken by the HGIA to mean it has to set aside at least another $20 million in GEMS funds for its own use. Or, as the agency states in its 2017 report to the Legislature, "As HGIA is not supported by general funds, and as loan administration and servicing will continue for 20+ years, this [PUC] order requires HGIA to set aside and reserve a portion of the loan funds to ensure proper administration and servicing until the loans are paid in full."

A Way Out?

GEMS money is not part of the state's general fund nor were the GEMS bonds secured by the full faith and credit of the state. Instead, the bonds are secured by what's called a non-bypassable fee charged to Hawaiian Electric ratepayers.

The fact that the HGIA has been slow (to be charitable) in approving GEMS loans has led some to call for raiding the fund. But this is not possible. As the bonds are secured by ratepayers, and not taxpayers, GEMS funds are not subject to distribution by the Legislature for purposes other than those set forth in the law establishing the program, passed in 2013.

The HGIA itself seems to acknowledge that it needs help in moving funds from the bank into the hands of parties who can make use of it. In its 2017 report to the Legislature, it offers a suggestion:

"By converting a portion of the GEMS fund into a revolving credit facility for any state agency to access low-cost financing to install energy efficiency measures would provide significant impacts towards the achievement of the state's Energy Efficiency Portfolio Standard (EEPS) goals as well as substantial, ongoing benefits toward the reduction in energy costs for both the state and Hawai'i's taxpayers."

The proposal is itself implicit recognition of GEMS' failure to deliver on its initial promises. Instead of helping renters, low-income families, and other economically disadvantaged residents of Hawai'i enjoy the benefits of energy-saving technology, HGIA is now recommending the funds be nothing more than a cheap in-house bank for the state.

— Patricia Tummons

DOE Uses GEMS Loan to Install Air Conditioning: Is That Allowed?

The Hawai'i Green Infrastructure Authority has recommended that the Legislature consider allowing at least part of the balance of Green Energy Market Securitization funds to be used as "a revolving credit facility for any state agency to access low-cost financing to install energy efficiency measures."

In a sense, this has already been done. Last year, the Legislature approved allowing the HGIA to lend $46.4 million, interest-free, to the Department of Education for "installation costs for energy-efficient lighting and other energy-efficiency measures related to heat abatement at public schools." The funds must be encumbered by June 30 of this year.


PHOTO: DOE

Riki Fujitani

Riki Fujitani of the DOE said his agency is "in a race to do that." So far, he added, about $12 million has been encumbered or spent. About 80 percent of old fluorescent lightbulbs have been replaced with LED lighting, he said. And now the DOE was working to replace older, inefficient air conditioning units. The cost of this effort is more than $90 million, he said, meaning that the DOE will use up all the remainder of the GEMS loan and still come up short.

But did the law authorizing the loan — Act 57 of the 2017 Legislature — include air conditioning as one of the specified uses of loan proceeds?

As originally drafted, the bill that became Act 57 (House Bill 957) did include language allowing "installation costs for air-conditioning." (Whether that actually means purchase of air-conditioning units or just the installation of them is a question for another day.) But after the bill was heard by the Senate Committees on Education and on Transportation and Energy, all references to air conditioning were removed and the focus was put on heat abatement.

The Senate committees' report on that draft says that "heat abatement in public school classrooms is an important policy goal of the State," going on to note that in 2016, the Legislature had appropriated $100 million for heat abatement in public schools. The committees "also find that the installation of energy efficient lighting and other fixtures can result in a reduction of waste heat and facilitate heat abatement," the report stated.

Testimony on House Bill 957 also suggested that the DOE itself and the HGIA were aware of the fact that air conditioning was not included. Kathryn Matayoshi, at the time superintendent of schools, said that the measures anticipated in the bill would "result in cooler classrooms, lower utility bills, and help offset increased costs of additional air conditioning."

Gwen Yamamoto Lau, executive director of the HGIA, stated that "reducing energy consumption and lowering the kW load may enable classrooms earmarked for the 'Cool the Schools' initiative to install air conditioners without requiring expensive and time-consuming electrical upgrades."

At the time the GEMS program was established, air conditioning, which consumes electricity rather than saving it, was excluded as a technology whose purchase could be underwritten by GEMS funds. In 2016, a proposal that would have called for the $100 million "cool the schools" initiative to be taken out of the GEMS fund failed, with critics pointing out that air-conditioning was not an energy-saving technology and was contrary to the purpose the GEMS program was intended to achieve.

Yet Fujitani insists that the use of GEMS funds to replace inefficient air-conditioners is consistent with the PUC's order, issued four months before Act 57 became law, approving GEMS loans to the DOE.

That order, which was issued by the PUC on February 22, 2017, controls what the DOE can do with the funds, Fujitani told *Environment Hawai'i*, and Act 57 "mirrors that order."

When the HGIA proposed the loans to the DOE, in its Program Notification 11, the objective was "to expand access and affordability of energy efficiency retrofits for the Department of Education." Eligible technology was identified as "Lighting (LED), Controls and Monitoring Devices, Mechanical Upgrades, and other Commercial EE." The agency informed the PUC that its intention was to finance "the high-impact replacement of all interior, exterior, and stadium lights with energy efficient LED for the 42 schools on the island of O'ahu, Maui, Lana'i, Moloka'i, and Hawai'i."

In approving the program, the PUC seemed to draw a distinction between the technologies that would be financed through GEMS funds and air conditioning: "the energy savings will reduce the kW load and facilitate the installation of air conditioners or other heat abatement technologies," the order stated.

In testimony to the Legislature on HB 957, Randy Iwase, PUC chairman, reiterated this point. The DOE's Ka Hei program, intended to minimize electricity consumption, "has developed shovel-ready EE initiatives, including energy efficient LED lighting and other energy conservation measures, such as the optimization and control of existing equipment and facilities (i.e., refrigeration and ventilation systems, etc.). [Program Notification] 11 is intended to provide DOE with access to financing to install EE and certain heat abatement measures that could significantly reduce DOE's kW load, energy consumption, and costs."

Still, the DOE's Fujitani insisted, allowed uses of the funds include retrofitting and replacement of old equipment, including replacing air-conditioning units that were 17 years old or older. "Energy-efficiency retrofits include AC," he said.

Yamamoto Lau, HGIA's director, also sees no issue with the use of GEMS funds to replace old air-conditioning units. "Replacing old (the median age of the equipment being replaced is 17 years), inefficient split and central A/C is considered 'other energy efficiency measures,'" she stated in an email to *Environment Hawai'i*, quoting language in Act 57. "Replacing the inefficient older units with more efficient units will reduce energy consumption. The DOE is also working with closely with Hawai'i Energy on this project." Hawai'i Energy is the PUC contractor that helps residents and businesses lower their energy bills by supporting replacement of energy-guzzling appliances, underwriting costs of LED lighting, and educating the public about their energy use. It is funded by a monthly fee on Hawaiian Electric customers' bills, part of which has been diverted for the last three years to pay off the GEMS bonds.

— Patricia Tummons

Pacific Paradise Debacle, Lawsuit Draw Attention to Fishermen's Plight

Late on the night of October 10, 2017, the Pacific Paradise, a Honolulu-ported longline fishing vessel, hit a reef just 1,000 feet off Waikiki beach in the middle of the night. Twenty people were aboard the 79-foot-long craft, which would normally have a crew of no more than five or six.

Just what it was doing in shallow water off Waikiki, miles east of the piers where longliners tie up, hasn't been explained. Jim Cook of Pacific Ocean Producers and owner, with partner Sean Martin, of several longline vessels, suggested that the vessel had arrived in Honolulu from American Samoa too late in the day to check in with Customs officials. "I believe in this case, the vessel shut down in Waikiki and drifted onto the reef while waiting to enter Honolulu Harbor," he said.

No one on board alerted authorities to the grounding. Honolulu Fire Department and U.S. Coast Guard personnel responded to emergency calls from civilians; all aboard were rescued.

The vessel itself was 45 years old and looked every minute of it. Within days of its grounding, as salvage crews were attempting to prepare it for removal, fire broke out. In the end, it took more than $1 million and nearly two months before the vessel, growing more derelict by the day as it was buffeted by surf, was freed from the reef, towed miles out to sea, and sunk.

But what of the crew?

As it turns out, nineteen of the individuals aboard were coming to Hawai‘i to crew on other longline fishing vessels, joining several hundred other foreigners who work on the 140 or so vessels that make up the Hawai‘i longline fleet. They had endured 12 or more days on the Pacific Paradise as it sailed from Pago Pago. A pleasure cruise it was not, with the boat carrying three times the number of men it was intended to accommodate.

After their initial rescue, they were in the custody of immigration officials. In the days following, the foreign fishermen were given over to the vessel owners who were their intended employers and began working under the labor contracts they presumably had signed before arriving here. As for the crew that was intended to work on the Pacific Paradise itself, they found employment on other vessels owned by the company, TWOL, LLC, that owned the doomed vessel.

The conditions under which the foreign fishermen work — being paid pennies an hour in harsh conditions, unable to go ashore even when the boats are in port, for terms that can last years — were documented in a report published in September 2016 by the Associated Press. Thanks to a loophole in federal immigration law, Hawai‘i longliners are able to use foreign crew members even if they are not given visas to enter or work in the United States. Their special situation means they cannot arrive on commercial flights into Hawai‘i and so they end up being transported aboard fishing vessels such as the Pacific Paradise.

Human Trafficking?

A federal lawsuit brought by two fishermen who jumped ship in San Francisco sheds light on the ways in which those fishermen are recruited and the conditions under which they — and presumably many others — are forced to work. The lawsuit was the first to be brought under the U.S. Trafficking Victim's Protection Act.

A settlement in the case against vessel owner Thoai Van Nguyen, doing business as Sea Queen II, was filed on January 3, bringing an end to two years of litigation. But the struggles of Abdul Fatah and Sorihin, the Indonesian fishermen who brought the suit, go back to 2009.

The two, both of whom had worked previously on commercial fishing vessels, were recruited by an Indonesian firm that promised them good jobs and wages far more than what they might earn in their home country. According to the lawsuit, the recruiting firm demanded the fishermen pay fees to a Hawai‘i middleman, Hernan Santiago, doing business as World Agent Enterprises, who had been asked by Nguyen to recruit crew for the Sea Queen II, one of more than 140 longliners that hold Hawai‘i limited entry permits, allowing them to fish for tuna and swordfish. The fees were between 300 and 400 U.S. dollars, an extraordinary expense for both men, but which they justified in light of promised wages. In Sorihin's case, he was told he would receive pay of $350 a month for the first year, $400 in the second year, plus bonuses of $10 for each ton of fish caught per trip. Fatah received similar assurances.

After signing contracts, the two men were presented with a second contract, which provided penalties in the event they did not work the full two years. As stated in the complaint, "Unexpectedly, PT Shilla [the Indonesian recruiter] demanded that Plaintiffs sign a second, separate contract, which imposed a penalty of IDR 10 million (approximately USD 1,064) if Plaintiffs failed to complete their two-year terms. Plaintiffs had no prior notice of this penalty, and were shocked and concerned because of its excessive amount. Plaintiff Sorihin complained to PT Shilla, as he had not previously signed a penalty contract when he worked on Japanese vessels. PT Shilla simply responded that their policy was that everyone sign the agreement. Because they had already paid substantial, non-refundable recruitment fees, prepared for their departures, and completed the recruitment process, Plaintiffs were compelled to sign the contracts."

From Indonesia, Sorihin, Fatah and four other Indonesian fishers took a series of flights — from

The longliner Knowledge docked in Honolulu Harbor in 2010.

Jakarta to Singapore to Sydney to Fiji to Samoa — ultimately ending in Pago Pago. There, they, along with two more Indonesian men who joined up with them in Sydney, were transported to a dock and placed aboard a "vessel that was broken and stationary," the complaint states.

They remained there four days, during which time four Filipinos joined them. "Food was only delivered one time per day, and Plaintiffs and the others had to beg local fishermen for extra fish to eat," according to the complaint.

Finally the fishing vessel Knowledge, corporately owned by Quan Do, Nghiep Pham, and Jacqueline Pham, all of Honolulu, and captained by Do, arrived and the 12 men boarded. (The corporation F/V Knowledge was involuntarily dissolved by the state Department of Commerce and Consumer Affairs in December of last year, three years after its last annual report was filed. The vessel is not among those holding current longline permits in Hawai'i.)

"The Knowledge was extremely overcrowded," the complaint states. "Plaintiffs were forced to sleep outside on the deck, with only a plastic sheet to protect them from the elements. The sheet did not protect them from the bitter cold, strong ocean winds, and water, and Plaintiffs both became sick from this exposure."

After several days at sea, Do, the captain, informed Sorihin and Fatah that they would be transferred to the Sea Queen II while the others would be transferred to the Sea Dragon and Kimmy, two other vessels home-ported in Honolulu.

"Plaintiffs were warned by the Filipino fishermen that the Sea Queen II was known to be an undesirable vessel to work on and that the captain was strict, stingy, and mean." Eventually the Sea Queen II pulled alongside the Knowledge. "In rough waters, Do directed Plaintiffs to board a small dinghy and to pull themselves over to the Sea Queen II by a rope connecting the two vessels."

Conditions as described by Sorihin and Fatah were harsh. Although the vessel had an indoor toilet, they and other crew were not allowed to use it and were forced instead to urinate and defecate in a bucket on the deck. When Sorihin asked to be allowed to leave, he was told he had to reimburse Nguyen the $6,000 that Nguyen said he had paid to recruit Sorihin.

Both men were injured in the course of their work aboard the Sea Queen II, but, they alleged, Nguyen did not allow them to seek appropriate medical care.

Once the vessel left Honolulu and began to pursue swordfish in colder waters, their situation deteriorated, with Nguyen failing to provide them with gear appropriate to the weather. During this time, they were also subjected to beatings from Nguyen's three adult nephews, who had come aboard when the vessel was docked in Honolulu.

The conditions aboard the Sea Queen II "made Plaintiffs increasingly desperate," the complaint states. "After severely injuring his thumb, Plaintiff Sorihin told Defendant Nguyen that he wanted to leave the ship because of the terrible working conditions." Nguyen refused.

"Plaintiffs could not buy their freedom; they could not afford to pay Nguyen USD 6,000 each, and they could not afford the total sum of all the costs and penalties they would incur if they left early," the court was told. Nguyen had told them they would be arrested if they attempted to flee the vessel, but Sorihin and Fatah "believed that they would die on board the Sea Queen II" if they did not escape.

In April 2010, while the Sea Queen II was docked in San Francisco, Nguyen and his son, Tony, left the Sea Queen II to make a visit to his San Jose home. Nguyen's nephews remained on board where, the complaint states, they "drank heavily." After they fell asleep, Sorihin retrieved his passport and that of Fatah from Tony's room. "With their passports and Seaman's books, Plaintiffs then escaped from the Sea Queen II."

In settling the case, Nguyen agreed to abide by code of conduct and to inform future fishermen of their rights under U.S. law. The settlement agreement further banned him from any further dealings with PT Shilla, the Indonesian recruiter, and Hernan Santiago, the Honolulu-based middleman.

Promises, Promises

Following publication of the Associated Press report on Hawai'i longliners' use of foreign fishermen, the Hawai'i Longline Association commissioned a rapid assessment of the status of foreign workers on longline vessels, according to testimony submitted to the Legislature last year by John Kaneko of the Hawai'i Seafood Council. The researcher who conducted that assessment, Amy Gough, "found no evidence of human trafficking or forced labor," Kaneko wrote. (Efforts to obtain a copy of this report were unavailing by press time.)

Kaneko was testifying on House Bill 438, which would have required foreign crew members to give the Department of Land and Natural Resources a copy of their employment contracts before obtaining commercial marine fishing licenses. Also submitting testimony were Jim Cook and Sean Martin, on behalf of the Hawai'i Longline Association. They stated that in response to the AP report— described by them as neither accurate nor fair — the HLA had developed a "Universal Crew Contract" and a "code of conduct" for vessel owners.

Environment Hawai'i was able to view the "universal crew contract." It states that the fishing "is aboard Hawai'i pelagic longline vessels making up to 15 trips per year. Trip duration is from 10 to 40 days" and that payment will be made within four days of landing. The crew member is not responsible for any recruiting fees, which are instead to be paid by the vessel owner. Finally, it provides that the vessel owner will hold crew members' passports, with "copies issued to the crew members. Crewmembers may access their passports at anytime."

That contract is thin gruel when compared to the more robust requirements that were agreed to by Nguyen, owner of the Sea Queen II, in settlement of the human trafficking case brought by Sorihin and Fatah. Those include his agreement to assure that the crew member will not be charged for costs associated with travel to the vessel; that he will have access to passports and other travel documents ("the Captain will safely store these documents for you if you want, otherwise, you are fully responsible for the safekeeping of such documents when in your possession"); that he will be provided with "appropriate protective clothing, in good condition, at no cost"; that he may return home without penalty if he decides to terminate his contract early ("in such a case, the captain will provide information about inexpensive return home options and will assist in making arrangements"); and that the crew member "will ordinarily be provided with minimum rest hours of ten hours … in any 24-hour period, and 77 hours in any seven-day period."

When asked about the code of conduct being developed by the HLA, Cook said that a couple of drafts of this were being discussed. "It's a constantly evolving thing, particularly involving manning agencies," he said. He added that he was familiar with the commitments that Nguyen had made in settling the lawsuit brought by Sorihin and Fatah, describing it as a "fairly solid model."

"I don't think we'll have the exact wording" as in the Nguyen agreement, he said, "but all will be covered." According to Cook, a code of conduct for vessel owners would be ready soon. ***— P.T.***

Aquatic Resource Managers Struggle To Fine-Tune Fishing License Scheme

PHOTO: NOAA

Longline fishing vessels in Honolulu.

The Department of Land and Natural Resources' effort to generate enough revenue to properly staff its fisheries data collection efforts and commercial marine license (CML) program hit a couple of snags at the December meeting of the Board of Land and Natural Resources. For one thing, the board chose not to raise the license fee for individuals as high as the department's Division of Aquatic Resources (DAR) staff said was necessary. DAR proposed $150 per license; the board approved a fee of $100 (up from $50).

According to division representatives, the fee hike was necessary because of expected cuts in federal assistance, increasing operational costs, as well as a court ruling barring it from charging non-residents a higher rate for their CMLs than Hawai'i residents. As a result of that ruling, the division's revenue dropped by about $150,000 a year. In the past, the division charged non-residents $200 per license and locals $50 per license.

DAR administrator Bruce Anderson said in a press release that the fee increase "will help us with our current needs, including support for new on-line reporting and licensing options to better serve the public."

However, during the Land Board meeting, DAR's Alton Miyasaka told the board that if all 4,000 or so current license holders renewed at an increased rate of $100 per CML, the division would still not be able to cover all of its expenses. And those expenses would be even greater if the division was fully staffed, he suggested.

"We have a licensing agent on O'ahu. That's all she does. She takes care of [CML] cards statewide. If she goes on vacation or gets sick, there's nobody there. We can't fill the vacant position. Other staff have to fill in," he said.

Positions that are supposed to be dedicated to conducting recreational fishing surveys, which together with the CML program give DAR a better picture of the total marine catch, are under-funded, he added. "Those people are all part-time now," he said.

Maui board member James Gomes asked whether any permanent DAR staff could cross-train other staffers to help the division meet all of its needs.

"The problem is that there are insufficient funds," DLNR director and Land Board chair Suzanne Case replied.

When Kaua'i board member Tommy Oi asked why the division doesn't simply charge recreational fishermen more for their licenses, Case pointed out that the division doesn't have the statutory authority to require recreational fishing licenses at all. "We're the only state that doesn't," Miyasaka added.

Board member Chris Yuen moved to approve the fee increase as proposed by DAR.

"Our people are stuck in this situation that their budget is going down the drain. … I hope if we just pass this, plug a hole in the budget, [we can] fix this with a vessel license in a year," he said.

Despite Case's and Miyasaka's arguments, when it came time to vote, it seemed unlikely that a fee hike to $150 would pass. Based on a recommendation by member Keone Downing to raise the fee to $100, the board voted 4-2 to in favor. Gomes and Oi opposed it because they believed the increase was still too high.

The new fee took effect on January 16.

Vessel License

If DAR and the Land Board get their way, many of the fishers now required to pay $100 for their CMLs won't have to for very long. At the December board meeting, DAR proposed to take to public hearings new rules establishing a commercial marine vessel license (CMVL). It would cost more than a CML, but would cover any and all fishers aboard a given vessel.

In its report to the board, DAR explained that fishers had been asking for such a license for years "and this request was echoed again during the recent commercial marine license fee increase" hearings.

"The need to have individuals separately licensed under the CML caused problems when random and infrequent visitors or part-time crew members are needed for a commercial fishing trip. It's not always easy to plan far in advance to get a CML for these people. Now that the fees could potentially be raised to $150 each, the infrequent fisher is less inclined to get an individual CML since they fish so little they would never recover the cost," the report continued.

Under the proposed rules, a license for a non-longline commercial fishing vessel would cost $400. Licenses for longline vessels would cost $1,500. Miyasaka asked the board, however, to set the non-longline vessel license fee at $300, $100 off the fee in the proposed rules.

"I'm currently in discussions with DOCARE [the DLNR's Division of Conservation and Resources Enforcement] and fishermen about what the vessel license is and what it's going to cost. It is a big issue for them. It's very likely these rules will come before you again," Miyasaka said.

He noted that he had not discussed the proposed longline vessel license fee with any longliners, and that with an individual CML fee of $100, rather than $150, the CMVL fees would have to be "adjusted" to ensure the program's costs are covered.

"It will take a little while for the vessel license to be put in place. In the meantime, [fishers] are subject to the fee for individual licenses. … We're anticipating when the vessel license is in place, most fishermen will choose that option," he said.

Human Trafficking

While DAR staff acknowledged that the rules it was proposing would likely need to

Water from page 1

Public Trust Dispute

On November 10, 2016, the Land Board approved a one-year holdover of nine water revocable permits on Hawai'i and Kaua'i, pursuant to Act 126 of the 2016 session, which amended Hawai'i Revised Statutes Section 171-58 to allow water permittees who had applied for a lease to continue diverting water on a holdover basis for up to three years, "provided further that the holdover is consistent with the public trust doctrine."

Of the six permittees on Hawai'i island, all but one are located in Ka'u and use water from old diversion systems once used for sugarcane production. The remaining three permittees on Kaua'i include KIUC, an agricultural cooperative, and a man who diverts water for himself, another irrigation cooperative, and Kaua'i County.

In its recommendations to the board to renew the permits, the Land Division asked that the board find that the renewal was consistent with the public trust doctrine, as required by Act 126. However, one of the four identified public trust uses of water is the reservation of water for Hawaiian home lands. And according to Department of Hawaiian Home Lands (DHHL) program manager Kaleo Manuel, the Land Division failed to include any analysis of the permits' impact on such reservations in its report to the board, which, he said, was not provided to his agency in time for him to prepare a response.

"Usually, we get a chance to do an agency review. Had that happened, we would have provided written testimony," Manuel said.

With regard to whether or not the recommended permit renewal complied with the public trust doctrine, he said, "it doesn't really, at all," in that it did nothing to protect DHHL's rights or reservations of water.

"There's a lot of focus on the agricultural use, yet it [the report] fails to identify other constitutional mandates, DHHL, and 30 percent of [rent] revenues due to the department. In just that case alone, that analysis is missing from the conversation. It just tries to justify that agricultural uses are public trust uses," he said.

He continued that the authority under which the permits were being renewed was HRS 171-58. HRS 171-58(g), however, directs the DLNR to notify DHHL of its intent to

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be tweaked, at least with regard to the license fees, members of the public concerned about possible human trafficking in the Hawai'i longline industry argued that the whole concept of a CMVL is not allowed under state law.

Larry Geller and attorney Lance Collins (representing native Hawaiian Maui fisherman Malama Chun, who disputes the state's practice of issuing CMLs to foreign fishers not legally admitted to the United States) both told the board that Hawai'i Revised Statutes allow CMLs to be issued to individuals only, not to vessels. They expressed their concern that should the board ultimately approve rules establishing a CMVL, the state would lose the ability to track longline crew members, most of whom are visa-less foreigners confined to the vessels they work on.

In recent years, reports by the Associated Press and a lawsuit filed by two longline crew members suggest that some of these foreign fishermen are treated little better than slaves.

Currently, each crew member is required to be licensed by the state. While the proposed CMVL rules would eliminate the need for longliners to obtain licenses for each individual on board a vessel, they would still require each licensee to provide DAR with reports on "crew or passengers, and any other relevant information the department may require."

Even so, Geller argued, "If this administrative rule could be real, it would mean there would be no control whatsoever. There's no control now, but it would be even less than no control over the fishermen. … They [foreign crew members] could be traded."

"This has the effect of sprinkling perfume on something that really doesn't smell very good in the longline industry. It won't work. To allow the vessels to hire totally unlicensed foreign fishermen is not going to fly. In any case it's against the statute. … It requires a change in the statute," he said.

Collins argued that state laws require that marine licenses be issued to "persons" only, and that those persons "be lawfully admitted to U.S." With regard to the latter, Collins has made similar arguments on Chun's behalf in an April 2017 petition to the board for a declaratory ruling. While the board denied the petition, the 2nd Circuit Court reversed that decision on December 29.

Collins testified that amendments made in the 1940s to the laws he cited were aimed at the practice back then of hiring fishermen not lawfully admitted to United States. He asked the board to use its powers to "not be complicit in human trafficking."

"A fleet of approximately 140 fishing boats docks mainly at Piers 17 and 38 in Honolulu. About 700 foreign citizens work on these boats, catching approximately $110 million worth of seafood annually. These foreign workers lack many basic rights guaranteed under U.S. labor laws. According to U.S.attorney Florence Nakakuni, chief federal law enforcement officer in Hawai'i, 'People say … they're like captives. … But they don't have visas, so they can't leave their boat, really,' " one of Collins' court filings states.

"The department has said, and I think in some ways the board has accepted this, all of those [human trafficking] issues are outside of the DLNR. But by licensing per vessel and not requiring every individual from getting a license, it further eliminates any oversight of this industry that has and makes tremendous profit in Hawai'i … It just takes it one step further way," Collins told the board.

Geller's and Collins' arguments were strong enough to cause Linda Chow, the deputy attorney general advising the board, to suggest that it defer voting on DAR's request so that the legality of the proposed rules could be determined.

Board member Yuen agreed that DAR should consult with the attorney general's office, but recommended that the board still authorize DAR to take the rules to public hearings.

"If they [the attorney general's office] say you can't do it, the air goes out of the tire," he said.

He added that the CMVL proposal wasn't done to shield longline vessels from scrutiny, but was aimed instead at "guys not having to buy a license for every one of his buddies" if they decide after a fishing trip to sell some of their catch.

To address the concerns raised about longline crew tracking, Yuen suggested including a requirement that owners provide a list of everyone on a licensed vessel. In any case, "to do something is really important for the program. It's [the CMVL] getting tied up with another issue. I'd like to find a way it doesn't get tied up with that," he said.

With that, the board voted to allow DAR to take the proposed rules out to public hearings only if the Department of the Attorney General determined they were legal. The attorney general's office had not done so by press time. — ***Teresa Dawson*** renew water rights, he argued, adding that only a few permittees had discussed their intentions with DHHL.

Land Board chair Suzanne Case countered that the statute Manuel was citing applied to leases.

"A permit is a lease, just a short-term lease," Manuel replied, adding, "even though it's a month-to-month [permit], there needs to be some analysis or some type of assurance the rights of DHHL are protected."

"Ka'u has a lot of water. Ag is a sleeping giant."
— Stanley Roehrig, Land Board

He complained that the state permittees in Ka'u on Hawai'i island are able to divert water for their needs while DHHL homesteaders directly makai of them don't have access to water for ranching operations. He also lamented the low rent the permittees pay to the DLNR, since a portion of that goes to DHHL.

Regarding the Land Division's recommendation to continue to charge some permittees a mere $5 per year per million gallons of water, Manuel asked, "is that really the value? That is a concern … for all RPs because of the mandate that DHHL is entitled to 30 percent. It goes directly to rehabilitation … scholarships, grants, ag-tech assistance. That funding is the direct chute to protecting and supporting the Hawaiian rehabilitation fund."

In response to some of Manuel's criticisms, board member Yuen, a lawyer and farmer who lives on Hawai'i, argued that it was in DHHL's best interest to support the permit renewals, rather than fight them.

"I get frustrated with these abstractions like the public trust," he said before pointing out that the Hawaiian Homes lands are actually "way downhill" from where the state permittees take their water, and that if the agency wanted to get that water on its own, it would have to apply for a lease and build its own delivery system.

"This is a practical issue. You should be on the side of these people getting a lease and working with them. Hawaiian Homes has a lot more resources to do EAs [environmental assessments] and the like. On Hawaiian Homes [land], there's lot and lots of land you can't even raise cattle on because there's no water for it. It's about doing. It's not about coming to the board and debating 171-58," he said.

Manuel agreed, noting that DHHL has been working with the island's Department of Water Supply, which claims to own the system, and Land Division staff on practical solutions.

"DWS has been reluctant to provide DHHL with water to support its farmers. We've been trying. We've spent over half a million dollars looking to get an alternative to the system," Manuel said.

"We're trying to come up with practical solutions … so we don't have to come to this board and say water is being used as a non-public trust use and [there is] no access for public trust users," he said.

He conceded Yuen's point that building a new water delivery system over 10 miles was neither logical nor practical for DHHL, and that it wanted to tap into the existing system. In the meantime, DHHL's 25 beneficiaries in the area are struggling to get water for fire prevention, he said. "I just want to share the struggles we face," he said.

'Caught in the Crossfire'

Both before and after Manuel's testimony, board members devoted extensive discussion to figuring out how to help the permittees get their water leases before Act 126 expires. At least with regard to the Ka'u permittees, which get their water from a spring that doesn't feed any perennial streams, "there's a lot more water available than anyone is using," Yuen said.

For those permittees, some of which are "very small operations," Yuen said it would be very difficult for them to navigate the department's lease process. They include Kapapala Ranch, Wood Valley Water & Farm Cooperative, Kuahiwi Contractors (also known as Kuahiwi Ranch), and the Edmund C. Olson Trust.

"It's about doing. It's not about coming to the board and debating 171-58."
— Chris Yuen, Land Board

Representatives from the Olson Trust, which also has a stake in the two Wood Valley permits and has developed an irrigation system for its farmers, testified that it had made almost no progress toward obtaining a lease, in part because someone they had initially hired to help with the process fell through.

The trust owns an irrigation system that serves more than 30 farmers who grow coffee, bananas, and other crops, according to CFO Jeff Clark.

"We've spoken to other farmers, a large macadamia nut orchard, that would like more water. It requires more infrastructure development. Now we're operating on a month-to-month permit. We've already made the investment. … We want to have some assurance we can continue to provide that," Clark said. He added that the trust has a hydropower plant that's fed by water coming down the hill from its coffee mill that generates enough power that "you could almost light up Pahala."

"We wanted to say one of the missions for the Olson Trust is to support … ag in general," he continued. "In Ka'u, we probably have the best prime ag land. Everything we grow down there grows bigger," he said, adding that there is an adequate water source and that his organization was "willing to invest in not only building the pipes to come down the hill but also maintaining those pipes."

"By no means is what we do a moneymaker. … We don't do it because we see it as a revenue source. We know if we want to farm, we need water. The area economically could use some help and ag is a huge industry we believe we can continue to grow down there," he said.

Yuen and other board members toyed with the idea that management of the state's irrigation system be turned over to the state Agribusiness Development Corporation, but later rejected it when it became clear that at least some permittees, such as the Olson Trust, were more motivated and had more money than the ADC has to devote to maintaining their diversions.

"These are small farmers, small ranches. To prepare an EA and watershed management plan that are called for in the statute for a water lease is an enormous undertaking … These are not ag operations that are [making] lots and lots of money that they can use to spend on environmental consultants. I just don't see how it's going to happen. It's one thing if it was a plantation doing this …" he said.

He added that the state's water lease requirements were written back when sugarcane plantations still consumed most of the water diverted from streams and springs, "in a period when these were scarce resources."

Land Division staffer Ian Hirokawa told the board that his division was "trying to make it work as best we can under the law.

We are sensitive. We are trying to balance everyone's needs."

His boss, Russell Tsuji, said he also understood Yuen's concern. "That was on our mind when this legislation came before the Legislature after hours and hours and hours of testimony," Tsuji said.

The bill that led to Act 126 stemmed from a decades-long fight between the corporations diverting dozens of East Maui streams, on the one hand, and Hawaiian cultural practitioners, taro farmers and conservationists who wanted those streams restored, on the other. The legislation was an effort to allow A&B to continue to meet the water needs of its sugar plantation and allow the state's other revocable water permit holders to also meet their needs.

"These people in Ka'u are getting caught in the crossfire. There's no marine life. There's no taro growers," Yuen said.

"The third year is coming up pretty fast and then the law sunsets and then we can't hold them over on the [revocable permit]. What are they going to do for water if they can't get through all these paperwork hurdles? We got to find a way to let this happen in a practical way … for people trying to grow things that supposedly people are in favor of," he continued.

To this, Tsuji pointed out that the permittees did sign a detailed letter from his division that explained the lease process.

Even so, board member Stanley Roehrig, also from Hawai'i island, said that the division needed to do more to help things along.

"Ka'u has a lot of water. Ag is a sleeping giant. The state has no plan for its development. This comes under the Land Division's kuleana. Until the Legislature comes up with something else, this is it, you two gentlemen," Roehrig told Hirokawa and Tsuji.

Board chair Suzanne Case reiterated Tsuji's point that it was the applicants' responsibility to meet the lease requirements.

"With all due respect, a lot of people down there are not sophisticated with advanced degrees to understand what we're doing here. … They've been living there a long time and we gotta help them," Roehrig replied.

Case acknowledged that the lack of progress among some permittees is a problem, but added, "I just want to make clear it's not the fault of our staff."

> *"I just want to make clear it's not the fault of our staff."*
> ***— Suzanne Case, Land Board chair***

A Path Forward

To perhaps lessen the Ka'u permittees' plight, Yuen suggested that at least the water uses there could be exempt from the environmental review process required by HRS Chapter 343 and that the requirement to develop a watershed management plan could be met by using one that the DLNR has already prepared.

"The two major issues … the EA and the watershed management plan, I think both are solvable. When using an existing source that's been there 100 years and dealing with something that does not feed perennial streams and does not flow to the sea … I think [meeting the Chapter 343 requirement] could be done with an exemption," he said.

With regard to the watershed plan requirement, he noted that the DLNR had prepared one for the Ka'u forest reserve. "That's the watershed management plan. We should be able to get past these obstacles," he said.

With that advice, Land Board members Case and Roehrig encouraged the Olson Trust to move ahead with getting their water leases.

> *"In Ka'u, we probably have the best prime ag land. Everything we grow down there grows bigger."*
> ***— Jeff Clark, Edmund Olson Trust***

"How long does a typical water lease take?" Clark asked.

"It's never been done!" Yuen replied.

In the end, Yuen moved to approve the renewal of the permits (except for KIUC's permit on Kaua'i, which was taken up separately, but eventually approved). In making his motion, he stressed that he wanted the DLNR to work with the permittees on what they need to do to get their leases.

If it turns out that Ka'u water uses can't be exempted from Chapter 343, the department needs to tell the permittees to start doing an EA, he said.

"Time is running out. One way or another this has got to be decided," he said.

He also asked that the department get confirmation on whether the DLNR's Ka'u forest reserve plan could serve as the permittees' watershed management plan.

"We're supposed to do something that's consistent with the public trust … by giving permits to people making beneficial uses. It may not be in the most perfect way … but [it serves the public trust] more than if it were denied and letting the crops die and cattle die," he said.

Board member Sam Gon agreed. "You cannot have [DHHL water] reservations unless you have infrastructure. If we deny, we would be erasing any way to have reservations," he said.

Regarding the problems Manuel had raised, board member Roehrig advised the Land Division to work with DHHL and the Hawai'i DWS to "to release and separate the distribution of the county water system from everybody in the Wai'ohinu (in Ka'u) area." He added that the division should get a legal clarification that part of the system's spring source "is a source for us to make state water leases directly to Hawaiian Homes beneficiaries."

Finally, Kaua'i board member Tommy Oi added that he wanted to see if the department could apply the approach to be made in Ka'u statewide, where it's applicable.

"We have issues on Kaua'i," he said.

The board then unanimously approved Yuen's motion.

P.S.

While the DLNR and the Land Board have been operating under the assumption that the holdovers will no longer be allowed beyond 2019, it's unclear whether that's truly a hard deadline. Act 126 states that the holdover permits can be renewed for up to three years and that the act will expire at the end of 2019, yet it also includes language that seems to keep the door open to holdovers beyond 2019.

The last two paragraphs of Act 126 state: "This Act shall be repealed on June 30, 2019, and section 171-58(c), Hawai'i Revised Statutes, shall be reenacted in the form in which it read on the day prior to the effective date of this Act; and

"Any holdovers first applied for under this Act prior to June 30, 2019, may be reauthorized, as provided in section 1 of this Act, **beyond June 30, 2019**" (emphasis added).

— Teresa Dawson

Land Board to Legislature: Please, Consider Shoreline Easement Bills

PHOTOS: HAWAI'I SEA LEVEL RISE ADAPTATION AND VULNERABILITY REPORT

Flooding in Kapoho Vacationlands, on Hawai‘i island.

"We have to be aware. It think it's quite likely, and probably in the lifetimes of our children, the removal of structures that are uninhabitable because of sea level rise is going to be a big government issue. The state is going to have to insist the property owner remove them or we're going to be out billions of dollars. . . . I think people are going to walk from properties. People are going to create shell companies that are going to hold properties they think they're going to abandon. It's not just the ocean coming in. The groundwater comes in and it becomes flooded. I think that's what we're going to be looking at in the future," said Chris Yuen, a former Hawai‘i County planning director, at the January 12 meeting of the Board of Land and Natural Resources.

Days later, the Department of Land and Natural Resources issued a press release linking to the new Sea Level Rise Vulnerability and Adaptation Report drafted by the Hawai‘i Interagency Climate Adaptation Committee (ICAC), which predicts that more than 6,500 structures in Hawai‘i would be compromised or lost with a rise in sea level of 3.2 feet, displacing more than 20,000 residents. The value of projected flooded structures and lands amounts to more than $19 billion statewide, the report stated.

With some hope of discouraging landowners from abandoning their doomed properties — and the structures they built — Yuen voted with the rest of the board that day to urge the Legislature to at least hold hearings on bills the Department of Land and Natural Resources has tried for years to get passed that would allow it to charge less than fair market value for shoreline encroachment easements.

The department's Land Division has had to pursue such easements with increasing frequency over the years, as erosion — whether caused by sea level rise, shoreline hardening, or other causes — has eaten away at coastal properties, leaving legally built, private shoreline structures on public land. Under the Department of the Attorney General's interpretation of case law, as shorelines move inland, so do property lines, and anything seaward of the highest wash of the waves is state land.

Under current law, the DLNR must seek fair market value for the use of state lands, except in limited circumstances. The department also wants easements in place to limit the state's liability for structures that landowners wish to retain. The high cost of those easements and the fact that they often need to be expanded with each new shoreline survey have raised concern among a number of Land Board members who question the fairness of charging so much and so often for legally built structures.

As reported last March in *Environment Hawai‘i*, bills supported by the department to reduce — or even eliminate — costs for shoreline encroachment easements failed for the fifth year in a row. The main argument keeping the bills from going anywhere has been this: Making it easier for landowners to retain structures located below the shoreline encourages development too close to the ocean at a time when movement inland should be encouraged. The state Office of Planning has repeatedly raised this point in testimony to the Legislature.

The bills introduced last year — Senate Bill 986 and House Bill 1120 — were deferred to this session. This year, at the urging of board members, the DLNR's Land Division drafted a letter for the board to sign, encouraging the Legislature to at least weigh in on the matter.

Board member and former legislator Stanley Roehrig, however, said he could not support a letter recommending passage of the bills because he objected to language in them that disclaimed state ownership of shoreline encroachments covered by the easements. He seemed to believe that the state owns the structures if the shoreline is set inland of them and that no easements were actually required in those cases. Land Division administrator Russell Tsuji and board chair Suzanne Case argued that is not the case. The state only owns the land beneath the structures, not necessarily the structures themselves, they said.

"There are different opinions on the what is the public interest here. I have a different opinion from you," Case told Roehrig.

"I'm happy to sign and just say, 'I don't concur,'" Roehrig replied.

"[Then] why would we send a letter?" Case asked.

"Why do we have to have a poison pill in there?" Roehrig countered, referring to the objectionable bill provisions.

"To me, it's only a poison pill for a plaintiff's attorney," Yuen answered, adding that some of the normal clauses included in the easements the department has issued are

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that the owner maintain insurance and cover the state's liability. "That's a reasonable approach to maintain insurance to compensate anybody who gets hurt," he said.

Before finalizing the language of its letter, the board discussed what the easements would cost if the bills actually became law.

"How does a board determine [the] amount, if it's not fair market?" asked Maui board member James Gomes.

Tsuji replied that it would be whatever compensation the board decided on, adding that landowners would not like to pay anything for it.

"The option would be to waive the fee. Anything in between would be more complicated. . . . If there's any reason why something in between makes more sense, we could evaluate it at that time," Case said.

"If we have the right to arbitrarily decide what to pay, you're going to run into problems with litigation," board member Keone Downing interjected. He recommended that the board establish some kind of fee structure to apply to easements should the bills become law.

"If we're going to create more problems because we don't have a formula to use . . ." he warned.

Tsuji said that granting the easements for free may create even more opposition to the measure. "You're giving away state land," he said. He then assured the board that his division would think about developing a fair method to determine the easement cost.

During public testimony, O'ahu resident Sam Monet recommended that the Land Board set a minimum easement cost high enough to discourage people from hardening the shoreline or to encourage them to move seawalls inland. "If you encourage the property owners to move the wall back, it allows for global warming . . . and beach access," he said.

He also agreed with Yuen's prediction about what's going to happen as sea levels rise. "When these guys who built these walls get old . . . they'll walk. And we are stuck with it. Our kids. . . . Make it expensive. It's our money, and we're gonna need that money later to take it down. Put it at such a price they'll decide, 'I don't want to go out that far,'" he said.

In the end, the board approved a brief letter to the Legislature endorsing the concept of modifying the state's land use law "to allow the assessment of less than fair market value by the Land Board when granting easements for shoreline structures that were legally constructed on previously private property but are now on public property due to erosion and other causes. We request the measures such as Senate Bill 986 and House Bill 1120 be heard and considered in committee."

We Pay Them

While the DLNR's easement scheme deals with shoreline structures that landowners want to keep, ICAC's sea level rise report focused more on ways to prevent development too close to the shore or to get landowners to move improvements inland, especially along "legacy beaches," such as Sunset Beach on O'ahu's North Shore.

The climate adaptation committee suggested that the state's Legacy Lands Act, which allocates a percentage of conveyance taxes for the acquisition of lands or conservation easements to protect them from development, be amended to "set aside funding for preserving priority coastal lands . . . to enable legacy beaches to persist."

"The Federal Coastal and Estuarine Land Conservation Program can also provide matching funds to acquire property from willing sellers either through fee simple purchase or through conservation easements," the report stated.

The committee also recommended that government agencies "consider the feasibility of a buy-out program for residential property owners vulnerable to sea level rise."

"Managed retreat has long been avoided in public dialogue as an adaptation strategy. Yet when weighed against the magnitude of risk faced by coastal and riverine communities, retreat should be included in the toolbox of strategies for climate adaptation. While there do not appear to be any existing residential land acquisition programs for sea level rise vulnerability, there are corollary programs at the federal level that could provide us with lessons and tools.

"The Flood Mitigation Assistance Grant Program (FMA) provides funding to states and local communities for projects and planning that reduces or eliminates long-term risk of flood damage to structures insured under the NFIP [National Flood Insurance Program]," the report states.

"The state could develop a policy for prioritizing areas for acquisition within the statewide vulnerability zone and model it after the FMA program. However, timing of such a program presents new challenges since a goal would be to preemptively move development from areas of increasing flooding and erosion risk before catastrophic losses occur, rather than compensating people after a disaster event. Nevertheless, a buy-out program for at-risk coastal properties needs serious discussion, given our expanded understanding of present and future risks of erosion and flooding risks through this report and other data tools referenced herein," it continued. — ***T.D.***