

Environment



Hawai'i

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Fishing for Answers At Lake Wilson

The litany of problems at Wahiawa's Lake Wilson is long: There are perennial and ongoing concerns about its odor. There may be problems with the water quality, since the reservoir receives effluent from a sewage treatment plant. And, not least, there are disturbing questions about the safety of the dam behind which lie the lake's 350 acres of water, which in places is more than 80 feet deep.

So what, exactly, are the state (responsible for dam safety and water quality) and the private owners of the lake doing about it?

In her research for this month's cover article, Teresa Dawson found that the Department of Health seems to turn a blind eye to the requirements of the federal Clean Water Act, continuing to allow unpermitted discharges into Kaukonahua Stream. The Department of Land and Natural Resources seems at least as concerned with providing anglers with freshwater fishing opportunities as it does with ensuring the safety of downstream residents. Dam manager Castle & Cooke, meanwhile, is most interested in keeping the irrigation waters flowing to its North Shore fields.

With all these varied and conflicting interests, any resolution of the problems probably remains years off. Unless, of course, disaster moves up the schedule.

Dam Safety Trumps Effluent Concerns At Central O'ahu's Wahiawa Reservoir

Should the dam collapse, a flood wave could envelop the communities of Waialua and Hale'iwa within 40 minutes.... Human safety is the primary concern," states a report to the 1996 Legislature written by the Wahiawa Reservoir Task Force. The group was established by the Legislature in 1995 to make recommendations on the various uses of the reservoir, also known as Lake Wilson.

Thirteen years later, the state Department of Land and Natural Resources is in the

process of making the Wahiawa Reservoir, a "high hazard" dam, safer. The reservoir was categorized years ago as a high hazard dam not because it was in danger of failing, but because a failure would result in significant loss of life and damage to homes, agricultural land, public utilities, and highways in Waialua and Hale'iwa towns on O'ahu's North

Shore. Since then, inspections have found structural flaws, which have worried state dam safety officials for years.

In June, the DLNR's Engineering Branch, which administers the state Dam Safety and Flood Control Program, ordered the owner and operator of the reservoir to take several steps to make it safer, including modifying the spillway and lowering the daily water level in the reservoir to 15 feet below the spillway.

And therein lies a problem: The federal Clean Water Act, the state Department of Health's administrative rules, and a consent

decree between the DOH and the City and County of Honolulu all seem to prohibit sewage discharges from the reservoir into Kaukonahua Stream. And the reservoir water does include effluent from the Wahiawa Wastewater Treatment Plant (WWTP), and on very rare occasions the Schofield Barracks Wastewater Treatment Plant, a fact that, it would seem, would preclude the water being discharged into the stream.

Despite the apparent conflict, both the



PHOTO: HAWAII WATER REUSE SURVEY & REPORT

The quality of the R-2 water limits the types of crops that can be grown by Dole Foods.

DLNR and the DOH have generally supported releases from the reservoir and its irrigation ditch into Kaukonahua Stream for dam safety purposes. Whether those releases pose a threat to public health or are illegal is debatable. Regardless of the legal or health issues, the state is pressing forward with the measures ordered by the DLNR.

The System

The Wahiawa Reservoir was created by the Waialua Sugar Company in 1906, when it

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Environment Hawai'i



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NEW AND NOTEWORTHY

Geothermal Wells to be Plugged: It's been two decades since they were drilled, but at long last, two geothermal wells in the Big Island district of Puna are going to be plugged. One of them, the 6500-foot-deep SOH-4 well, is an observation well drilled by the state on privately owned land outside Pahoā. The other, KA1-1, 7850 feet deep, was intended to be one of a series of wells that, in the heyday of geothermal dreaming, would supply electricity to O'ahu via an under-sea cable.

The large geothermal scheme founded in the early 1990s, and since then, the Office of Hawaiian Affairs has taken ownership of the Wao Kele o Puna land where former owner Campbell Estate had planned to build the grid of geothermal wells, while the state took over ownership of KA1-1.

Geothermal energy plans have been scaled back substantially. Nowadays, Puna Geothermal Venture operates the only producing geo-

thermal plant on the Big Island several miles away from the Wao Kele o Puna field. The abandoned wells (including SOH-4 and KA1-1) could eventually pose a hazard. With that in mind, the state Legislature appropriated funds in 2007 to close the oldest of the wells.

Work on the project is to begin by the end of summer, at a cost of nearly \$2 million.

GAO Raps Wespac: The U.S. Government Accountability Organization has released its report detailing its investigation of the Western Pacific Fishery Management Council. Critics of the council had managed to get U.S. Rep. Henry Waxman to request the study, alleging financial mismanagement, lack of transparency in council affairs, and other irregularities.

The report, published last May, did not find any smoking guns that would have bolstered the claims of critics. In fact, the GAO claimed that some of the allegations were "factually inaccurate."

Still, the GAO stopped far short of giving the council and its director, Kitty Simonds, a clear bill. The National Oceanic and Atmospheric Administration (the agency charged with council oversight) was given nine specific recommendations for tightening the reins on the council. They include:

- Advising the council to document every request for information from federal or state legislators. (By law, the council cannot lobby, but it may provide technical information when asked to do so. The council has appeared on many occasions before legislators, stating that it was doing so by request. However, the GAO could find no supporting documentation.) NOAA was also urged to ask the council to notify its regional counsel in advance of such meetings and to provide annual briefings on rules governing council

member conduct, including contacts with legislators.

- Discouraging the council from giving meeting participants payments in cash. (For the puwalu series of meetings, participants were given envelopes with cash payments.)

- To make council operations more transparent, urging the council to have meeting minutes reflect not only the occasions when council members recuse themselves, but also the reasons for recusal.

- Working with the council chair to publish council records, including meeting minutes and briefing book materials, on the council's website (www.wpcouncil.org).

- Working with the council chair to develop and publish the council's policy on what types of information are to be made available to the public at the council office and what is available only through the filing of a Freedom of Information Act request.

Behind the Curtain... As reported in the June edition of *Environment Hawai'i*, the 'aha kiole committee established by the Legislature has an impressive web presence: www.ahakiolo.org. Since then, we have learned that the domain name was registered in November 2007 by "K. Simonds" of the "Western Pacific Regional Fishery Management Council." (The council continues to insert "regional" into its name, although no one else does.)

The phone number of the registrant is that of the council's central switchboard. But the email address given by K. Simonds does not have the "noaa.gov" suffix that attaches to the official email addresses of council staff. Instead, it is wprfmc@gmail.com.

Kudos: To Teresa Dawson, who walked away with top honors in the open-print news-column category of the Hawai'i chapter of the Society of Professional Journalists' 2008 Excellence in Journalism awards. Dawson won for her regular "Board Talk" column, covering the actions of the state Board of Land and Natural Resources. She was competing against columnists from daily newspapers and other media.

Patricia Tummons was named a finalist in the open-print editorial-writing category for her editorial on the Navy's use of mid-range sonar.

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Quote of the Month

"It's as if I was whistling in the wind."

— **Carroll Cox, Envirowatch**

Kilauea Water System Report Confirms Illegal Diversion into Ka Loko Reservoir

It's right there in black and white: "DLNR does not have any documentation of a Registration of Stream Diversion Works and Declaration of Water Use, a Stream Diversion Works Permit, or a Water Use Permit for Moloa'a Ditch."

Since the late 1990s, Moloa'a residents suspected something or someone was messing with the uplands to make their stream act so screwy. Sometimes it wouldn't rise during heavy rain, sometimes it would rise without rain, it went dry two summers in a row, and sometimes the water flowed brown or grey, says Hope Kallai, one of four area residents who over the years expressed concerns to the state about the possible illegal diversion of a tributary of Moloa'a stream.

In May, when the consulting firm Sustainable Resources Group International, Inc., released a draft of its Kilauea Irrigation Water Engineering Design and Monitoring Study for the Kaua'i Office of Economic Development, the answer was revealed.

The Moloa'a Ditch had been refurbished, the report stated. The original Moloa'a Ditch was part of the Kilauea Irrigation System, which feeds into and conveys water from the Ka Loko Reservoir on Kaua'i's North Shore. The ditch had long ago fallen out of use, the report states, but had diverted water from Kalua'a Stream directly into Ka Loko Ditch, bypassing the reservoir. Kalua'a Stream eventually flows into Moloa'a Stream.

A second Moloa'a Ditch later carried water from Kalua'a Stream to Ka Loko Reservoir. The report states that the ditch begins in the Moloa'a Forest Reserve and flows to the northwest along the contour of the land onto Mary Lucas Trust property. A map prepared in 2006 by the Department of Land and Natural Resources indicating the intake of the newer Moloa'a Ditch suggests that the diversion originates on state land in the Conservation District.

The report states that historic documents suggest that the second ditch fell into disrepair after the closure of the Kilauea Sugar Company and "we surmise that the water from this ditch was not necessary to meet the demands placed on the system by diversified farming. In addition, no permits were found authorizing the diversion of Kalua'a Stream and use of the Moloa'a Ditch. It is our understanding that some-

time during the last ten years a third party restored this ditch, allowing water to again be diverted from the stream and delivered to an area near Ka Loko Reservoir. There were indicators that this ditch was maintained and that it had been cleaned out during the past several years."

The report also notes that in addition to providing water to the Ka Loko Reservoir, the refurbished Moloa'a Ditch also feeds a pond on land owned by James Pflueger, a sub-user of Mary Lucas Trust water, a trust beneficiary, and owner of Pflueger Properties.

Based on observations during an inspection, SRGII estimated the Moloa'a Ditch carried 1.3 million gallons of water per day.

Revelation

When Kallai read the draft and the final report, she flipped. She called federal and state officials, she wrote letters and emails, and filed complaints with anyone she thought could help restore the natural flow of Moloa'a Stream. And for the most part, she was either ignored or was told that action must wait until the lawsuits regarding the Ka Loko Dam conclude.

And that's part of her problem. After weeks of rain, in March 2006, the 400 million gallon Ka Loko Reservoir burst, killing seven people. The Mary Lucas Trust, James Pflueger, the state, Kilauea Irrigation Co., Inc. (which operates the irrigation system), KIC owner Tom Hitch, the victims' families, and affected property owners have been embroiled in civil and criminal cases regarding the breach since then. Trials have been scheduled for next year.

In a May 20, 2009, complaint to the state Commission on Water Resource Management, Kallai wrote that because of the illegal diversion, "Neighbors with declared stream uses are not able to use their water rights. There is no county water distribution system for potable or agricultural water throughout Moloa'a; most farms are dependent upon well water. Now we are having a hard time planting because we cannot depend upon having water. Many stream front lands are going unworked now because owners do not feel safe due to unknown factors/persons manipulating and



PHOTO: SRGII

Moloa'a Ditch Sub Tunnel

controlling the waters."

In 2001 and 2002, Kallai, Greg Osborn and Bill Chase, on behalf of the community group Malama Moloa'a, wrote to CWRM about what they thought was an illegal diversion of a tributary of Moloa'a Stream. Also in 2001, downstream taro farmer Daniel Garnet filed a separate complaint with CWRM about the diversion of Kalua'a Stream. He attached a map where an "unmarked ditch appears to be taking a considerable amount of water from this tributary."

He added, "the additional dirt/sediment added to the stream has not only silted it and muddied it considerably, but the water level has suffered due to the plugging it has caused. . . . The river level dropped considerably in June and has lowered the water so as to dry my lo'i. Growing taro with no water is difficult if not impossible."

On February 1, 2002, CWRM requested permission from Pflueger to inspect the Mary Lucas Trust property, which is where staff believed the diversion originated. On February 5, CWRM staff met with William Tam, one of Pflueger's attorneys. Tam told CWRM that he and Kaua'i attorney Max Graham inspected the area of concern on January 16, which he said was not owned by the Mary Lucas Trust but by Pflueger Properties.

In a February 13 letter to CWRM, Tam wrote, "At our February 5 meeting, we examined the topographic and tax maps and were able to make some important findings." Particularly noteworthy was their conclusion that "if there is any diversion that would feed Ka Loko Reservoir, the diversion would have to originate far back in State of Hawai'i land. Since water does

not run upgrade, the steep upgrade slope from Moloa'a and Kalua'a streams towards the higher elevation Lucas Trust land and Ka Loko Reservoir make it physically impossible for a diversion from private land to reach the Ka Loko Reservoir.

"Given the physical impossibility of water flowing from the Moloa'a or Kalua'a streams from private land uphill to either the Lucas Trust or to Ka Loko Reservoir, I requested that you contact the complaining party to identify the specific location of the alleged diversion.... You agreed to inquire further about the location before we proceed any further."

According to CWRM's Ed Sakoda, commission staff planned to follow up, but did not get to inspect the area before the Ka Loko Reservoir broke. And with the lawsuits that followed, he says, the agency's attorney has advised it to put its investigation of the matter on hold. (DLNR engineers did get to inspect the area a few weeks after the breach and observed an inflow ditch on state land near Kalua'a Stream, crossing Mary Lucas Trust land and feeding the Ka Loko Reservoir.)

In Limbo

Even though the diversion has been identified as illegal, the state does not appear to have any immediate plans to do anything about it.

For decades, the Kilauea Irrigation Company, Inc., has had a month-to-month revocable permit to use state land to divert water from Pu'u Ka Ele stream into the Ka Loko Ditch. The state Board of Land and Natural Resources renewed the permit annually, but after the reservoir broke, KIC owner Tom Hitch could not find a single company to renew his liability insurance policy at a premium he could afford. The policy expired December 31, 2006.

Because liability insurance is required of all permit- or lease-holders of state land,

and perhaps also because Pflueger Properties and the Mary Lucas Trust ordered the DLNR to stop the water from entering Ka Loko Reservoir, the Land Board revoked KIC's permit on September 28.

However, Kilauea farmers who rely on KIC water pleaded with the Land Board to keep the water flowing until a solution could be found. Land Division administrator Russell Tsuji noted that it would likely take three to six months to obtain the Conservation District and Stream Channel Alteration permits that might be needed to physically stop the diversions. He recommended that the permit's termination date be delayed until KIC obtained those permits, and the board agreed.

Land Board chair Laura Thielen added that she would work with the state Department of Agriculture on the possibility of transferring the diversion rights to the farmers, perhaps to a farmers' co-op should they decide to form one.

Although the board's decision was intended to address KIC's lack of insurance while giving the community time to resolve the issue, it appears that little has been done since.

The DLNR's Office of Conservation and Coastal Lands has not received any application for a permit to dismantle the diversions and the most recent correspondence in files with the Land Division is a December 24, 2007, letter from Hitch asking that the DLNR refrain from stopping the flow into Ka Loko Ditch. By this time, Hitch had rented his house and moved to southeast Asia, blaming the move on his inability to get general liability insurance. Because he couldn't work as a licensed contractor, he couldn't afford to live in Hawai'i, he wrote.

Hitch added that hundreds of people will be adversely affected if water no longer flows in the ditch, including KIC's 20 customers, most of them organic farmers.

He added, "I have no intention of abandoning [KIC], my decades of hard work or the farmers. Besides, [KIC] is a monopoly regulated by the PUC [Public Utilities Commission] and is mandated to stay in business as long as it has rate holders requiring its services. I could not shut down [KIC] even if I wanted to."

Hitch wrote that he hired certified water system operators Val Inanod and Rowland Wong to maintain the ditch in his absence.

"The PUC, like the DLNR, also has an insurance requirement policy but in the interest of the customers (rate holders), and being extremely knowledgeable about the entire situation, the PUC has chosen, unlike the DLNR, not to enforce its insurance rule. Once the litigation is over KIC should once again be able to obtain insurance," he wrote.

No response could be found in Land Division files, but Kallai insists that the Moloa'a diversion should stop immediately.

"You can't say it's illegal and keep using it," she says of the Kalua'a diversion.

And the SRGII report seems to agree. It states, "Moloa'a Ditch is unpermitted and during the community meeting on the draft report we were made aware that any diversion of waters from the Moloa'a watershed would be challenged. We therefore do not recommend Moloa'a Ditch be used or that [KIC] or others acquire permits to allow the use of water derived from the Moloa'a watershed."

The report does, however, recommend that the KIC ditch and Ka Loko system continue operating, despite their physical deficiencies and legal and regulatory obstacles.

"[I]t is our conclusion that these deficiencies can be overcome, and with some improvements to both the infrastructure and operations, the systems can continue to function into the foreseeable future," it states. — *T.D.*

Dam Safety from page 1

dammed the confluence of the north and south forks of Kaukonahua Stream. Built to irrigate sugarcane fields to the north, the reservoir is the largest freshwater impoundment in the state, with a holding capacity of about 2.5 billion gallons and a surface area of about 350 acres. Overflow from the reservoir runs back into Kaukonahua Stream through a spillway, and eventually flows into Ki'iki'i Stream, which flows into Kaiaka Bay on O'ahu's North Shore.

In 1928, the Wahiawa Wastewater Treat-

ment Plant, owned and operated by the City and County of Honolulu, began discharging secondarily treated sewage into the south fork of Kaukonahua. In 1994, effluent from the Whitmore Village Wastewater Treatment Plant, which had been discharged into the north fork since 1968, was sent to the Wahiawa WWTP, which now discharges about two million gallons of R2 effluent a day into the reservoir. (R2 effluent is acceptable for some agricultural and recreational uses.) By 1997, the WWTP was processing the wastewater from some 25,000 residents.

(Since 1975, the Army's Schofield Barracks Wastewater Treatment Plant has been discharging its effluent — today about 4 million gallons a day — directly into one of Dole's irrigation ditches which runs parallel to Kaukonahua Stream. Unlike the Wahiawa plant, which had a National Pollutant Discharge Elimination System Permit from the state Department of Health to discharge effluent into just the reservoir, the Schofield facility has an NPDES permit to discharge into the stream in case of emergency or during maintenance activities, no more than 36 days a year.)

For decades, an irrigation ditch distributed reservoir water mixed with treated effluent generated by the Wahiawa and Schofield plants to thousands of acres of sugarcane. That stopped around 1996, when the plantation closed. The water is now used to irrigate pineapple, seed corn, mango, papaya, and other crops in Central and North O'ahu. The irrigation demand ranges from about eight million to about 14 million gallons a day.

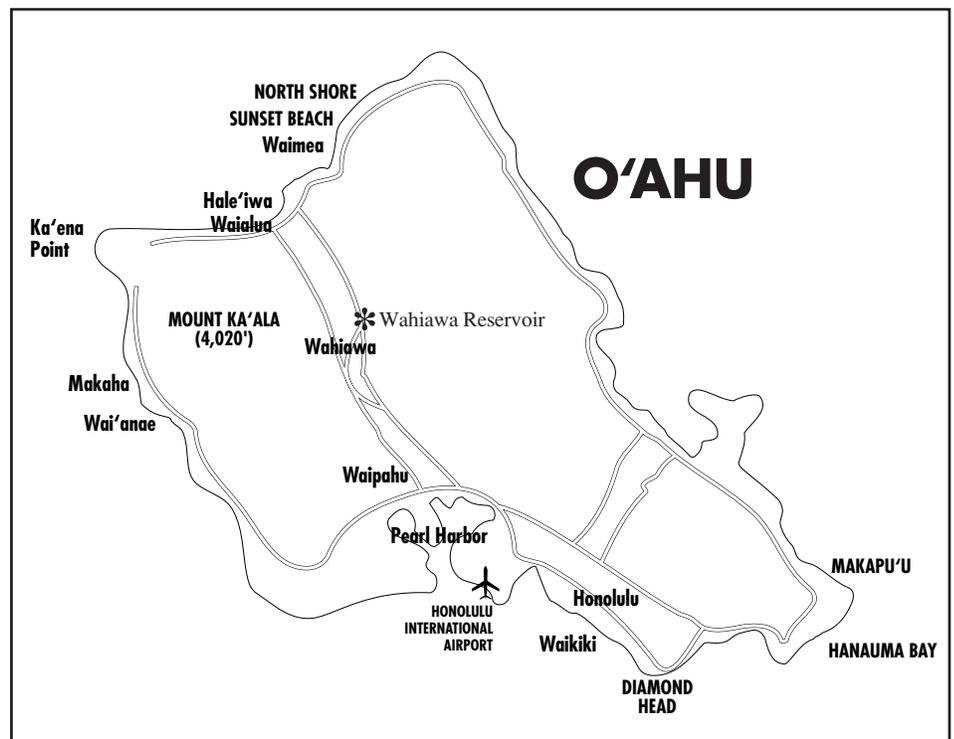
In the 1950s, the DLNR began stocking it with sport fish and has managed the area – designated as the Wahiawa Public Fishing Area – since 1957 through a cooperative agreement with Castle & Cooke, which also owns a portion of the reservoir along with Sustainable Hawai'i, LLC (which bought its interest last year from the Galbraith Estate). Castle & Cooke subsidiary Dole Food Company, which owned the Waiialua Sugar Company, operates the reservoir and the ditch. The reservoir is considered a navigable water of the United States, but swimming is not allowed because of the effluent. (In its report to the 1996 Legislature, the Wahiawa Reservoir Task Force wrote, “Notably, although it is the Department of Health’s position that the discharge into Kaukonahua Stream requires an NPDES permit, DOH believes use of the reservoir as an effluent outlet and a non-contact recreational area are compatible.”)

A 1998 report by AECOS, Inc., which does water quality testing, states, “By the early 1960s, fish kills started to occur in the reservoir signaling the fact that the three uses of Wahiawa Reservoir [irrigation, waste disposal, and sport fishing] were not strictly compatible and indicating that pollution or more specifically, eutrophication, was a concern that had to be reckoned with.”

Consent Decree

The state Department of Health granted its last NPDES permit for the Wahiawa WWTP in 1989. (Under the Clean Water Act, an NPDES permit is required whenever a facility discharges pollutants from a point source, a ditch or pipe, for example, into waters of the United States.) It expired on March 1, 1994. The permit itself stated that it would not be reissued and required the city to divert its effluent before the permit expired. According to the 1995 Wahiawa Reservoir Task Force Report, the DOH chose not to renew the permit because the city had no long-term plan for effluent disposal if Dole went out of business.

Despite the city’s repeated requests for a new or extended NPDES permit, the DOH



refused and the permit expired without the city finding an alternative site to dump its waste. On May 20, 1994, the state sued the city for discharging effluent into the reservoir without a permit. But in November 1997, after efforts by the city to develop a joint-diversion project with the Army fell through, the parties decided to settle the case through a consent decree.

The decree states that within three years of its effective date of March 2, 1998, the city would complete construction and begin operation of a system to reclaim all the wastewater from the Wahiawa WWTP and would either divert effluent from the reservoir, continue to discharge through a deep outfall into the reservoir, or would devise some other alternative acceptable to the DOH. The decree also sets stricter effluent discharge limitations and requires the city to monitor for nitrogen, phosphorus, and fecal coliform bacteria. Under the decree, however, those requirements automatically terminate three years after the effective date (March 2, 2001), or when the DOH issues a new NPDES permit, whichever occurred first.

With regard to discharges into Kaukonahua Stream, the decree states, “During those times when the waters in the Wahiawa Reservoir equal the dam which belongs to the Waiialua Sugar Company, the resulting overflow from the Wahiawa Reservoir into Kaukonahua Stream is permitted.” The decree required the city to notify the DOH when such discharges appeared likely as well as during the dis-

charges. It also recommended that the city provide the DOH with a written report within five days of any discharge.

Instead of paying penalties for illegal discharges from 1994 to the effective date of the consent decree, the DOH required the city to complete \$150,000 worth of environmental projects, including the purchase of an aquatic plant harvester (for the effluent-fed *Salvinia molesta* that had begun carpeting the reservoir’s surface); restocking the reservoir; and the purchase of a boat, trailer, equipment, supplies, and services for water quality monitoring.

The decree was to have remained in effect until the city completed its reclamation system, all disputes about stipulated penalties were resolved, or until the DOH issued the city an NPDES permit for discharges to the reservoir and any challenges to the permit are resolved, whichever occurred last.

Instead of diverting its effluent, the city chose to continue discharging into the reservoir. The city planned to acquire a 10,000 square-foot easement from Dole for its new outfall and modify its plant to produce cleaner, R-1 level effluent.

On March 2, 2001, the DOH extended the deadline to complete the reclamation system to May 21, 2001. On that day, however, the DOH approved another modification to the decree. This time, the city was given until August 31 to complete its reclamation system, and instead of the effluent limitations and monitoring requirements expiring in three years, they would

expire only after a new NPDES is issued or when the consent decree expires.

The expiration terms of the decree were also amended. It would remain in effect until "at least any disputes about stipulated penalties are resolved and 1) the city implements a reclamation system that diverts all plant flow out of the reservoir, or 2) the city implements a reclamation system that involves discharge into the reservoir, and the DOH issues the city an NPDES permit for discharges into the reservoir and any challenges to the permit are resolved."

Although the consent decree leaves open the possibility that the DOH may one day issue a permit for discharges into the reservoir, Hawai'i Administrative Rules suggest that a permit to discharge the reservoir's water into Kaukonahua Stream may not be permitted, at least not any time soon.

Kaukonahua Stream has been designated a Class 2 water to protect its recreational purposes, support aquatic life, agricultural

rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements."

Dole's Role

The consent decree may have authorized the WWTP's continued discharging into the reservoir, but it didn't address the issue of discharges from the reservoir into the stream. After the consent decree became effective, efforts by Dole to keep the reservoir from flooding by releasing water via one of its ditch gates got the attention of environmental watchdog Carroll Cox.

On May 6, 2002, after heavy rains, six feet of water flowed over the reservoir's spillway and flooded a residential area known as Otake Camp. The rain also caused

Yong calculated that lowering the reservoir's water level by five feet would require the release of 284 million gallons of water, ten feet would require the release of 562 million gallons, and twenty would require the discharge of 1,148 million gallons.

On June 23, Cox photographed water gushing into Kaukonahua Stream from the Wahiawa Reservoir through a pipe attached to the Dole irrigation ditch and causing a turbid plume in the stream. After complaining to the DOH, the department told him it would order Dole to stop discharging into the stream and on July 16, it did just that. (Two days earlier, however, a malfunctioning ultra-violet light disinfection system at the WWTP resulted in some 878,000 gallons of treated but undisinfected wastewater being released into the reservoir.)

In a July 16, letter, then-DOH deputy director Gary Gill informed then-DLNR director Gilbert Coloma-Agaran that no NPDES permit authorized the discharges into the stream.

"It is our understanding that the discharge is controlled by Dole Food Company Hawai'i (Dole), and that the water discharged comes from the bottom of Lake Wilson. The Department requests that the Department of Land and Natural Resources and Dole cease the discharge of muddy waters in present capacity and, if it is necessary to continue the discharge, release water from a higher level in Lake Wilson where the water quality is better," Gill wrote.

At 9:00 a.m. that day, Dole Foods closed its bypass line into Kaukonahua Stream.

"As a result of this action, the water in the reservoir has risen to the bottom of the spillway. With no storage capacity available in the reservoir, more water will be flowing over the spillway. As this level of water rises in the spillway, the potential for flooding of Otake Camp increases," Yong wrote in his letter to Cox.

Appalled at the state's actions, Cox complained to the EPA on September 25, 2002. In a letter to Jo Ann Cola, an environmental engineer with the EPA's water division, Cox alleged that the state, Dole, Wahiawa Water Company, the DLNR, the DOH, and the Army had all violated the Clean Water Act.

Although DOH's Gill had ordered Dole to stop its discharges into Kaukonahua Stream, Cox stated that Dole's Tanabe told him that the DOH's Dennis Lau had authorized the discharge of water containing effluent into the stream (a charge Lau vehemently denied) and that Yong's letter also alluded to past DOH approvals for emergency releases.

Cox included photographs showing the

"DOH believes use of the reservoir as an effluent outlet and a non-contact recreational area are compatible."

— Wahiawa Reservoir Task Force

and industrial water supplies, shipping and navigation. Under the rules, Class 2 waters "shall not act as receiving waters for any discharge which has not received the best degree of treatment or control compatible with the criteria established for this class. No new treated sewage discharges shall be permitted within estuaries."

Alexis Strauss of EPA's Region 9 says that if Dole is discharging pollutants into the stream through a point source, then it probably should be required to have an NPDES permit. However, Laurence Lau, DOH deputy director of Environmental Health Administration, explained in an email to *Environment Hawai'i* that at the time the consent decree was created, "there were conflicting legal cases on the need for a permit for discharges from a dam. DOH took the position that a permit was not needed under the circumstances." He added that he does not recall why the decree included the condition about discharges into Kaukonahua Stream, given the DOH's position that no permit was needed. "The condition may have been included out of an abundance of caution," he wrote.

He added, "The EPA is issuing or has issued a regulation to clarify that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. This

the treatment plant to release about 9,000 gallons of raw sewage into the reservoir that same day.

At the DLNR's request, Dole agreed to lower the water level of the reservoir by discharging water into Kaukonahua Stream through an outfall in its irrigation ditch. The DLNR's Division of Aquatic Resources had recommended that the water level be lowered by a maximum of 10 feet, a level that would provide greater relief to floodwaters while still protective of aquatic life in the reservoir. But according to DLNR records, because Dole's manager said he needed to have more water in the reservoir for irrigation purposes, the DLNR and Dole agreed to lower the water level no more than five feet.

According to a July 2002 letter from DLNR flood safety engineer Sterling Yong to Cox, executive director of the nonprofit EnviroWatch, "DLNR also instructed Dole Foods to talk to the State Department of Health to obtain their authorization to lower the water level during this emergency before they begin. DLNR mentioned that the DOH in the past has been cooperative and have issued verbal approvals for such emergency releases. [Dole's Yoshizaki Tanabe] said that he did obtain their authorization and was preceding [sic] with lowering the water level."

state of disrepair of Dole's irrigation ditch and "points where the reused effluent from the Wahiawa and Schofield Barracks Waste Water Treatment Plants is intentionally being discharged into waters of the state, which constitute a clear violation of the Clean Water Act."

He added that the Army's Schofield Wastewater Treatment Plant has an NPDES permit to discharge effluent, for no more than 36 days a year, into the Kaukonahua Stream for emergency purposes or during repair of the Dole Irrigation ditch. But, he went on to say, the city has no such permit to discharge effluent from the Wahiawa Reservoir into the Kaukonahua Stream. "We don't understand Mr. Gill's rationale for suggesting or authorizing discharge of water from the surface when it would still be a violation of the Clean Water Act," Cox wrote. "How can he make that suggestion when there is no permit or court order? The water still contains high amounts of phosphorus, nitrogen, fecal coliform and other contaminants."

Dam Safety Pact

On December 19, 2003, staff with the DOH, the DLNR, the state and O'ahu civil defense agencies, and the city met with Dole representatives to discuss the safety of Wahiawa Reservoir. (The meeting was held less than two weeks after heavy rains led to an equipment breakdown at the Wahiawa WWTP and the spilling of nearly 200,000 gallons of raw sewage into the reservoir.)

A DLNR report presented at the meeting states that the reservoir's 183-foot wide spillway has a capacity of handling only 16,300 cubic feet of water per second (cfs). A 100-year storm would require a capacity of 17,800 cfs, and a PMF (probable maximum flood) storm would require 105,000 cfs.

The report states that the embankment dams that experience extended overtopping "are in serious danger of being breached," and that a dam failure could result in the flooding of Waialua and Hale'iwa towns.

To manage a 100-year storm event, the report states, the reservoir gage elevation would have to drop to 40 feet, which is 40 feet below the spillway elevation.

The report also states that the effluent from the Wahiawa WWTP "results in the classification of the lake waters as R-2 reuse waters," and that in accordance with an NPDES agreement, "R-2 waters are not to be released into the stream, except by acts of nature." It adds, "It is not anticipated that the city will meet the requirements for R-1 reuse waters."



Wahiawa Reservoir

PHOTO: HAWAII WATER REUSE SURVEY & REPORT

Despite this apparent acknowledgement that discharging R-2 water from the reservoir into the Kaukonahua Stream is illegal, the DLNR recommended, and all parties agreed, to lower the water level "immediately upon the signing of a concurrence letter by the affected parties to expedite the protection of the public's health and safety. All parties to the agreement shall work with due haste in formalizing an acceptable agreement. The agreement will specify that DOH shall not take any regulatory actions for release of lake reservoir waters into Kaukonahua Stream if associated with maintaining water levels at or near 72.5 feet gage elevation. The agreement will specify that Dole Foods will maintain proper water level in the reservoir at no cost to the state."

Four days later, then-DLNR director Peter Young followed up with Ronald Nishihara, project manager for Castle & Cooke Homes Hawai'i, Inc. Young thanked him for attending the meeting where the agencies and Nishihara "were all in agreement that lowering the water level in Lake Wilson should proceed as soon as possible."

"We would like your company to commence immediately with lowering the water level in the reservoir. We have notified the DOH, area legislators, and will do our best to notify the affected communities of the pending release of water from the reservoir," he wrote.

No agreement like the one described in the December 13 report appears in files at the DLNR's engineering branch or at the DOH's Clean Water Branch.

Déjà Vu

While the state seemed comfortable with its decision, Cox's Clean Water Act concerns remained.

Over the years, heavy rains and the occasional power outage or equipment failure led to several large sewage spills. So on October 6, 2006, Cox's attorney, Michael Ostendorp, complained to DOH director Chiyome Fukino about what he considered to be Clean Water Act violations and threat-

ened to file suit within 60 days unless the DOH took appropriate action.

Ostendorp highlighted the breakdowns at the Wahiawa WWTP.

"The latest occurrence was on September 14, 2006, when 45,320 gallons of untreated wastewater was released into the Reservoir because of an ultraviolet disinfection unit malfunction. There have been 11 reported discharges, from August 11, 2001 until September 14, 2006, resulting in over 1,064,229 gallons of non-disinfected wastewater (R3) or raw sewage, that have been discharged into the Wahiawa Reservoir and subsequently into Kaukonahua Stream. This violates the mandate of said Consent Decree, the State of Hawai'i Constitution, Hawai'i Law, and the Clean Water Act," he wrote.

Ostendorp added that tests by the DOH in 2004 on fish in or around the reservoir indicated some cause for concern and further testing was recommended. "To date, the Level II test has not been conducted," he wrote.

Ostendorp also scolded the DOH for not taking advantage of federal grants to test the bottom of the reservoir for effluent contaminants, including lead and mercury, from the Schofield Barracks and Wheeler Air Base, which discharged their waste into the reservoir decades before the CWA was enacted in 1948 and revised in 1972.

On November 15, Ostendorp and Cox met with Laurence Lau, who explained the department's efforts to resolve the problems at the Wahiawa Reservoir.

"During the meeting, you proved to me that you were willing to listen to my client's concerns, and also that you actually wanted to do something about the problem. Sure enough, shortly after our meeting I was informed by Mr. Cox of EnviroWatch that the discharge of polluted water from Lake Wilson into Kaukonahua Stream had stopped," Ostendorp wrote in a November 28 letter to Lau.

Ostendorp wrote that there no longer appeared to be a need to file a lawsuit. "The only issue remaining would be the tier II testing of the fish in Lake Wilson," he wrote.

A 2007 report by the state Agribusiness Development Corporation adds that the DOH had also assured Cox that an NPDES permit would be issued for the discharges after the department developed Total Maximum Daily Load (TMDL) limits for the stream and reservoir.

But within months after the meeting with Lau, Dole had reopened its release gate to lower the level in the reservoir and,

according to Cox, the DOH has failed to fulfill its promises to complete the TMDLs in a timely manner.

"It's as if I was whistling in the wind," Cox told *Environment Hawai'i*.

Despite Gill's and Lau's orders, it's clear from records at the DOH's Clean Water Branch and the DLNR's engineering branch that not everyone on the state's side had a problem with the discharges.

A July 27 email from DOH inspector Libby Stoddard to the city notes that Dole's irrigation ditch was releasing water into Kaukonahua Stream and that, "[w]e at CWB have received complaints regarding the odor at Wilikina Bridge, probably due in part to the volume of reservoir water being discharged to the stream."

Addressing concerns expressed by the city that overflow at the spillway might violate the consent decree, she wrote: "Effluent from the Wahiawa WWTP has been 'introduced into Kaukonahua Stream' ever since Waialua Company started discharging reservoir water into Kaukonahua Stream to lower the reservoir level back in late 2005. It is my understanding that the CD [consent decree] advance notification requirement [when water flows over the spillway] was for public safety since there are people living in Otake Camp who could be flooded out by high flows over the spillway."

Also, a July 31, 2007 investigation report, which documented water discharging from Dole's flume into Kaukonahua Stream "at a very high rate," also concluded, "the purpose of discharging the reservoir water is to relieve stress on the dam caused by increased water volume in the reservoir and to protect the public. An enforcement action by the DOH CWM is not warranted."

Water Quality

Whether or not the discharges have been legal, it's unclear if the reservoir contains contaminants at levels that pose a threat to the public. And if it does, how much the effluent currently contributes to those levels is also unknown.

A decade ago, it was pretty clear that the WWTP played a big role in nitrogen and phosphorus levels in the reservoir. A 1998 water quality assessment report by AECOS found, "An important source of ammonia in Wahiawa Reservoir is WWTP effluent which discharges about 118 kg of ammonia (about 80 percent of the nitrogen in the effluent) into the reservoir each day." The ammonia had the potential to decrease dissolved oxygen levels (as the ammonia turned into nitrate and nitrite), and kill fish. Proper aeration, however, could reduce the nitrification of ammonia, the report stated. Even after considering nutrient inputs from runoff and rainfall, AECOS concluded, "the WWTP is the primary source of

nutrients entering Wahiawa Reservoir," but that both runoff and the effluent "contribute to the surface water layer of the reservoir."

Also, a 2000 study by Scott Wells of Portland State University found that 80 percent of the phosphorus in Wahiawa Reservoir comes from the WWTP.

Since then, the city has upgraded its facility to nearly meet R-1 level effluent standards and Stoddard says it's become "a good little plant." However, a 2004 water reuse report to the state Commission on Water Resource Management explains that while the sewage plant has the components to produce R-1 effluent, it doesn't meet DOH standards.

"In order to meet the new [DOH] guidelines, an additional bank of UV lamps is required," the report states, adding that the DOH also requires the plant to have a backup disposal system. (The lack of a backup system is a serious problem since, nearly every time there are heavy rains, thousands of gallons of raw or partially treated sewage spill into the reservoir.)

Even before the upgraded system, pollutant levels in the effluent have consistently been well within the consent decree's discharge limits. But even now, the effluent occasionally fails toxicity tests. In each case, where less than 50 percent of tilapia exposed to 100 percent effluent for 96 days survived, the

high levels of nitrate and phosphorus are difficult to ascertain, inadequate waste management seems more of a cause than over-fertilization of agricultural lands in the upper portion of the watershed," the minutes state.

When board chair Michael Lyons asked Yost if he thought it was safe to consume edible products from the streams and the bay, "Yost responded no, it was not safe," the minutes state.

Although he didn't point to any one cause of the contaminant levels, Yost did say at the neighborhood board's September 28 meeting that there was "unusual contamination coming from Lake Wilson."

In response to the health concerns expressed by the board after Yost's reports, the DOH's Brian Hunter said that he hoped the effluent from both the Wahiawa and Schofield treatment plants will be R-1 soon so that they can use it elsewhere.

According to the 2004 water reuse report, the city plans to upgrade the Wahiawa facility "to full R-1 capability" and had a \$400,000 federal grant to design a distribution system to deliver R-1 water to the Central O'ahu Regional Park.

The DOH's Linda Koch, who prepared the state's most recent water quality assessment report (2006), does not refute Yost's data, but explains that his team's methods differ from

"An enforcement action by the DOH CWM is not warranted."

— Department of Health investigation report

city attributed the deaths to high ammonia and nitrogen levels.

Recently, contaminant studies by researchers with the University of Hawai'i have found that the reservoir area and the watershed below contain high levels of nitrite, nitrate, and phosphate, especially in the lower reaches of the watershed.

At the February 26, 2008, meeting of the North Shore Neighborhood Board, Dr. Russell Yost of the University of Hawai'i reported on his work with the Watershed Participatory Assessment and Action, a Clean Water Act project funded by the state Department of Health with Environmental Protection Agency funds. The project, the meeting minutes state, "was designed to document and suggest improvements to recurring natural resource issues and problems plaguing the North Shore communities of Waialua and Hale'iwa."

Given his test results, Yost said that "[c]learly, remedial action is needed to reduce the levels of nitrate and phosphorus in the major streams and the bay. While the cause of

those of her department. Because water is so variable, the DOH requires ten data points to make a determination on contaminant levels, whereas Yost's team only took one sample per site, she says. (It should be noted that tests done in 2003 by AECOS of the reservoir's water at various depths also found high levels of ammonia, phosphorous, and nitrate + nitrite.) Her 2006 assessment of the reservoir and Kaukonahua Stream was based only on visual evaluations, what Koch called "windshield surveys" that were done in response to a 1998 lawsuit. She adds that the DOH is currently trying to gather as much information as it can—from the UH, the U.S. Geological Survey, and the National Oceanic and Atmospheric Administration, among other places—to fill the data gaps and, in fact, her office plans to release recommended TMDLs for the area within the year.

Lau wrote that the processing of an NPDES permit for the discharge into the Wahiawa Reservoir is pending the completion of the TMDL analysis, which is "focused on long-term ecosystem and public health protection,

not the potential short-term and immediate endangerment of public health that may be associated with impacts of the current release of reservoir water.”

“Once the TMDL, which specifies Waste Load Allocations (WLAs) is approved by the U.S. EPA, the Hawai'i DOH will proceed to process the NPDES permit application for the discharge from the Wahiawa Wastewater Treatment Plant (WWTP) into the Wahiawa Reservoir,” he wrote, noting that the city is in the process of enhancing the plant's effluent quality to “reliably produce R-1 quality recycled water for distribution and delivery to the Board of Water Supply for uses outside the reservoir and streams.”

With regard to Yost's test results, Lau noted that the DOH's Hazard Evaluation and Emergency Response Office had discussed the issue with a downstream watershed group and its university consultant about possible contamination that may affect human health.

“Based on our fish tissue testing in the reservoir, some of the reservoir fish are accumulating certain substances in their tissue at levels that may suggest limiting consumption of reservoir fish to avoid increased/unacceptable human health risk. If those substances are in the reservoir water, then some of it is probably flowing into the stream and Kaiaka bay,” he wrote.

Widening the Floodgates

“[T]he DOH has given priority to public safety concerns and relies on DLNR for a determination of what reservoir level is needed for dam safety. We may not be able to avoid a change in downstream water quality. That is something to look at,” Lau wrote.

Water quality issues aside, both the North Shore community and the state are most concerned with flooding that could happen when the reservoir is overtopped or the dam breached. In March 2006, Kaua'i's Ka Loko reservoir broke after weeks of heavy rain, sending hundreds of millions of gallons of water downhill and killing seven people. After the breach, the DLNR launched an extensive effort to identify and address potential problems at dams throughout the state. And in October 2007, an inspection of the Wahiawa reservoir found several deficiencies. A report on the investigation was issued in August 2008 and was forwarded to Dole in October.

On March 13, 2009, after severe storms in December 2008 and two large sewage spills in January, Dan Nellis of Dole Foods, Mark Takemoto of Dole Foods/Castle & Cooke, Sustainable Hawai'i's Howard Green, five staff members of the DLNR's Dam Safety Section (including Engineering Branch chief Eric Hirano), and Annette Tagawa of the

DLNR's Division of Aquatic Resources met with the DOH's Alec Wong in the department's conference room to discuss the “impacts and constraints for possible interim operations to mitigate against failure of the dam due to overtopping from large storm events,” minutes of the meeting state.

The DLNR's engineering branch was in the process of determining a safe initial starting reservoir level to allow for a 100-year storm event. In 2003, the DLNR had set a level of 72.5 feet, 7.5 feet below the spillway. Meeting minutes state that Dole has operated the reservoir at levels below 69 feet.

The engineering branch proposed that Dole fix its three broken intake gates to allow for faster draw-down of the reservoir and to provide backup should any one gate fail. Currently, only one of Dole's gates works.

The minutes state that the DOH “indicated that their agency did not have any special problems or authorization requirements that would arise from maintaining the reservoir at a lower level. DOH indicated with release gates at different water levels, there could be experimentation to develop a mixing of water being released to best balance the water quality in the reservoir and in the stream.”

By the end of the meeting, all of the parties present agreed that Dole Foods would drop the level of the reservoir to a daily average of 65 feet, since anything below 60 feet could lead to fish kills.

Two months later, the DLNR's Hirano sent Green of Sustainable Hawai'i a notice of dam safety deficiency, which threatened penalties of up to \$25,000 a day for continued violations.

In the June 4 notice, the DLNR listed five priority recommendations in addition to the actions agreed to at the March meeting:

- Modify the spillway and dam to safely pass the PMF [probable maximum flood] or breach the dam. “The existing spillway capacity is less than 50 percent of the PMF. This is a serious dam safety deficiency,” the notice read.
- Evaluate the need to provide additional drawdown capacity, since only one 20-inch gate intake is operational and the other three are not.
- Perform an embankment stability investigation. The DLNR was concerned that there is no embankment filter zone between the hydraulic fill and the rock fill. The lack of a filter zone could lead the hydraulic fill to go into the rock fill as the timber core wall deteriorates.
- Develop a new dam instrumentation plan and program since all instruments are in a deteriorated state and are not being maintained.

- Remove unwanted vegetation and maintain grass cover.

Hirano ordered Green to submit a status report to the DLNR by July 31.

In his June 30 response, Green wrote that although he owns most of the land beneath the reservoir, Dole leases his portion and also owns a portion of the dam. Under the lease, he wrote, Dole is responsible for maintaining the dam and the reservoir “in good and safe operating condition and to live up to all regulatory requirements...”

Green wrote that he had put Dole on notice that it is in default of its lease and required the company to meet its lease obligations, “in particular, emphasizing the critical need to restore at least two gates in the outlet tower so that there will be more adequate draw down capability.”

With regard to the requirement that the reservoir have capacity for a PMF, Green took issue with the state's standards.

“[I]n spite of the concern that the dam could be overtopped and destroyed in a PMF, your Department has asked for an agreement that the waters would be maintained at a level of at least 70 feet of depth, notwithstanding that your engineering report concludes that from that level, a PMF would overtop the dam and destroy it thereby causing loss of life.

“So it's an essential question: Has your department determined what the safe PMF level would be...? If so, what is it?” he asked. He added that reaching the level requested by the state is not as easy as simply opening a gate. After heavy rains in December 2008, he wrote, “it took a little more than two months to bring the level from the level of the spillway at 80.5 feet back down to 69 feet because of rains that have fallen since December 11,” he wrote.

Given the difficulty the state has had trying to manage all of the various interests tied to the reservoir, some have argued that the state should just get rid of the dam.

“It's absurd,” Cox says. “They're creating the public threat by allowing the water to be contained.” And oddly enough, his sentiments are echoed by some DOH officials who feel that containment of the water within the reservoir has led to odor and water quality problems and that the dam is a hazard that should be removed.

Given the fact that the Waiialua Irrigation System serves some of the most productive agricultural land in the state, and that the reservoir continues to be Wahiawa's only effluent outfall and one of the state's main public freshwater fishing areas, it's unlikely that will happen any time soon.

— *Teresa Dawson*

BOARD TALK

Kama'aina Kids Chosen to Replace Friends to Run He'eia State Park

Had they known it would end up this way, they probably wouldn't have done it. Earlier this year, members of the state Board of Land and Natural Resources directed the Department of Land and Natural Resources' State Parks Division to determine who was best qualified to run He'eia State Park by issuing a request for proposals (RFP) for a long term lease. At the time, it seemed the fairest way to address the issue. The Friends of He'eia, a grassroots, non-profit group that has run educational programs at the park since the mid-1980s, was no longer the only entity interested in the job. The Friends, who had struggled to obtain grant funding on the basis of no more than a revocable permit (cancelable on 30 days notice) for a portion of the park, sought a long-term lease a few years ago, but were met with opposition from other area residents who expressed interest.

But at the Land Board's May 22 meeting, board members clearly wished they had

Parks staff solicited one of the applicants to bid on the project. Friends of He'eia executive director Carole MacLean confirmed to *Environment Hawai'i* that the head of Kama'aina Kids, which submitted the winning proposal, told her board that the Parks Division's Steve Thompson recommended that Kama'aina Kids apply.

When MacLean complained to the Land Board that the criteria used by the DLNR's evaluation committee (made up of State Parks staff, including Quinn and Thompson) failed to include any requirement that the applicant have some knowledge of the area, board chair Laura Thielen said that such a standard would favor some applicants over others. In response, MacLean pointed out that the criteria, which seemed to value only child education and not education or other programs for the broader community, also favored one applicant over the others — in this case, Kama'aina Kids over the FOH and the Ko'olauloa Hawaiian

"The Friends of He'eia will still be the Friends of He'eia..."

— **Carole MacLean, FOH executive director**

given themselves a larger voice in the outcome. At that meeting, Division of State Parks administrator Dan Quinn asked the board to approve the posting of the highest-ranked applicant. Because of recent changes in the state's procurement law, Quinn said, the division could not disclose the name of the winner, the names of the applicants, or even the number of applicants.

Given the restrictions and the fact that several members of the public had shown up to testify, at-large board member Sam Gon asked, "What should I be listening for regarding the testimony?... Testimony doesn't really bear on the board's decision?"

In the end, it didn't, and the Land Board voted unanimously to approve Quinn's recommendation, although some members were clearly unhappy with the situation. Despite the inevitable outcome, before the vote, board members and supporters of the Friends of He'eia testified that the RFP process was flawed. Jim Anthony, executive director of the non-profit Hawai'i La'ieikawai Association, claimed that State

Civic Club.

Kama'aina Kids is a private, non-profit organization that provides childcare programs, including, preschool programs, before- and after-school programs, day camps, environmental education programs, enrichment programs, sports clinics, and hotel programs. According to its website, the group employs about 1,000 people, serves nearly 9,000 children and families a day and is one of the largest childcare providers in the state.

The FOH, on the other hand, founded in 1982, was formed by community members when the former owner of Ke Alohi Point proposed building a condominium complex there and replacing the 600-year-old He'eia fishpond with a marina. Using grants and volunteers, including interns from the University of Hawai'i, the FOH conducts natural resource and cultural programs for children and adults.

MacLean says that she and her attorney met with State Parks staff after the Land Board's meeting to discuss how the win-

ning proposal was selected, raising many of the same concerns she expressed at the board's May meeting. Unless the DLNR decides to grant her an appeal, she says, the FOH is supposed to vacate the park by the end of this month, although she says representatives from Kama'aina Kids expressed a willingness to collaborate and told her, "Nobody's going anywhere."

Should her appeal or her attempts to work with Kama'aina Kids fail, MacLean says, "the Friends of He'eia will still be the Friends of He'eia, we just won't be based [at the park], probably." She adds that fighting the Land Board's decision could become a very expensive, very long process, which she says her group doesn't want. They just want the park taken care of, she says.



Board Amends Tradewinds License

I'd like to be optimistic this is going to happen," Kaua'i Land Board member Ron Agor said at the board's June 12 meeting. "Are there any viable candidates should this not go through?"

Since the mid-1990s, Tradewinds Forest Products, LLC, has struggled with its plans to build a timber mill/co-generation plant and to log the Waiakea Timber Management Area, just south of Hilo. Over the years, the Land Board has granted one license amendment after another to keep the project alive, but with recent efforts by the state to promote renewable energy development, Division of Forestry and Wildlife administrator Paul Conry told Agor that should Tradewinds again fail to meet the conditions of its timber license with the DLNR, "there are bioenergy companies that may be interested" in taking over the license area.

At the time of the June meeting, Tradewinds was in default of its license because it had failed to pay pre-stumpage fees to the DLNR. At the same time, the company was attempting to partner with GMO Renewable Resources, which Conry said he was glad to see, since the company also has access to timber. "This looks like a partner that's got some staying power," he said.

Tradewinds president Don Bryan explained to the board that he was trying to get a total of \$20 million in equity funding; \$10 million from existing partner Rockland Capital and \$10 million from GMO. He said he expected the funding to be secured in September and pointed out that Tradewinds

has paid the state more than \$300,000 already.

While Conry recommended amending the license to push back the pre-stumpage payments until Tradewinds could secure its capital, Board chair Laura Thielen wasn't as eager to do so, at least not without including some kind of additional benefit to the state.

"A lot of people are coming to the department and seeking to lock up land.... You're asking the state to take 100 percent of the risk of your funding efforts," she told Bryan.

When Big Island board member Rob Pacheco asked what the risk really was, aside from a few hundred thousand dollars in pre-stumpage fees, Thielen again pointed out that there are other companies interested in the area.

"Nobody comes in and asks for a 15-year extension," she said, referring to the fact that Tradewinds has been trying to get its project off the ground for about that time. "It just happens. One way to ensure progress is to have a cost for occupying lands."

Big Island resident Scott Enright, who has been critical of Tradewinds in the past, testified that the company did not even have a building permit.

Still, the board voted to amend the license as Conry requested, but ordered DOFAW to give a report to the board in October on the status of financing and also to prepare a submittal for termination of the license.



Aquarium Collector Wins Permit, Except for Take of Live Rock

It used to be routine, but board chair Laura Thielen was uncomfortable letting things carry on as usual.

"Six-hundred pounds of live rock?" she asked Dan Polhemus, administrator for the department's Division of Aquatic Resources at the Land Board's June 12 meeting. Polhemus had recommended approval of a collection permit to Andrew Sim of the Seattle Aquarium to gather fish and live rock (coral skeletons usually covered by coralline algae) for use in displays. In the past, such permits had been issued by the division, but, according to Polhemus, a deputy attorney general advising the DLNR had recently determined that such applications must be brought to the Land Board for approval.

Because the Land Board has fined people tens of thousands of dollars over the past year for taking stones – for a church imu or

to be sold as hula implements – from the Conservation District and for boat damage to coral, Thielen wasn't sure why the department would bless an application for the take of 600 pounds of live rock.

"Do you have a statewide limit so there's a clear line? We're doing a lot of enforcement actions regarding coral and live rock. This seems really inconsistent. I'd be more comfortable not having live rock in the permit [and having the division] come up with a policy for the state," she said.

"Nobody comes in and asks for a 15-year extension. It just happens."

— Laura Thielen, DLNR

Polhemus said his division viewed the collection as part of an educational program.

When Rob Pacheco asked how much aquarium collecting goes on, Polhemus said that while there are not many permits for it, "There's been a certain amount of staff ambivalence about mainland aquarium collecting." The DAR's Alton Miyasaka said that only the Waikiki Aquarium, the Maui Ocean Center, and the Seattle aquarium have been issued collection permits in the past and that those permits are only issued every other year.

Given Thielen's concerns, the board approved the permit with the deletion of live rock from the list of target items.

At the Land Board's July 22 meeting, at the board's request, the DAR submitted for approval a review policy for the collection of live rock and protected coral through special activity permits.

Among the many guidelines proposed, the DAR recommended that a single permittee be limited to taking ten fragments of live rock, no longer than 50 cm, per site and no more than 50 pieces per year. The DAR would cap the number of total pieces covered by all permits in a given year to 200 per

reef and fewer than 10,000 statewide.

The DAR also recommended that no out-of-state transport of live rock be allowed "without justification as to the benefit to the people of the State of Hawai'i or to management of the protected resource equal to, or exceeding, the need to fully protect the trust resource as provided by law."

The DAR also included guidelines for field methods and the take of stony corals. In a separate item, the DAR proposed penalty guidelines for damaging, killing or illegally taking stony corals. Proposed fines ranged from \$100 for minimal damage to a small coral colony in a low-value area to \$1,000 for maximum damage to a large colony in a high-value area. — T.D.

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Final Scorecard of 2009 Legislature

With the deadline for the governor's vetoes of measures passed by the Legislature this year having come and gone, we can finally report on the bills described in our July issue whose fate was unsettled when we went to press in June. Here's the scorecard:

House Bill 366, banning the take of manta rays in state waters: This bill became Act 92 when it was signed by Governor Lingle.

House Bill 590, further streamlining the permitting process for renewable energy facilities: In her veto message, Lingle noted that the measure duplicated some of the language in another bill – House Bill 1464 – that beefs up the renewable energy standards for public utilities. That bill, which is Act 155 of the 2009 Legislature, made HB 590 redundant, she noted.

House Bill 994, appropriating half a million dollars for a spaceport license for the state: This became law (Act 187) without the governor's signature. **Senate Bill 537**, establishing an Aerospace Advisory Committee, was signed by the governor and is Act 52 of the 2009 Legislature.

House Bill 1174, giving the University of Hawai'i rule-making authority over the summit area of Mauna Kea: This was signed by Lingle and is now Act 132 of the 2009 Legislature.

House Bill 1271, a comprehensive measure that would have pushed Hawai'i in the direction of food- and energy-self-sufficiency by (among other things) adding \$1 to the nickel tax now levied on each barrel of imported oil: It was no secret that the administration was adamantly against this,

and Lingle's veto could come as no surprise to anyone following this issue. "This bill is objectionable because it raises taxes on Hawai'i residents and businesses by an estimated \$31 million per year at a time when the community can least afford these taxes," she wrote in her veto message. The Legislature could not override the veto.

Senate Bill 1, imposing limits on the take of 'opihi: "This bill is objectionable because it establishes unenforceable standards for the harvesting of 'opihi that run counter to good fisheries management practices," Lingle wrote in her veto message. She added that the Department of Land and Natural Resources already has authority to regulate the take of 'opihi. "I have asked the department to conduct a scientific, fact-based review of 'opihi to determine whether harvesting limits should be imposed and when they should be imposed," she wrote. The Legislature did not override the veto in its special session.

Senate Bill 50, imposing more restrictions on the Board of Land and Natural Resources when it comes to leasing lands to producers of energy crops: Lingle vetoed this on the last day possible (July 15), stating in her veto message: "To saddle renewable energy projects with additional hearing requirements adds costs and delays and treats these projects in an adverse fashion, compared to similar applications for use of public lands.... Complicating the process the Board must follow to make determinations on the use of public lands that will reduce the state's dependence on imported foreign oil is not in the best interests of the public." The Legislature overrode the veto

and the measure is now Act 19 of the 2009 special session.

Senate Bill 266, to establish a climate change task force: Lingle vetoed this measure, saying that the state's existing Greenhouse Gas Emissions Reduction Task Force had the same goal of "improving the environment by reducing greenhouse gas emissions." "We cannot afford to use our limited resources, particularly at this time, to create a task force whose main purpose is to study an issue that we already know much about," she wrote in her veto message. The Legislature overrode the veto and SB 266 is now Act 20 of the 2009 special session.

Senate Bill 1345, to give compensation to holders of state agricultural and pastoral lands who have part of their leased lands withdrawn: Governor Lingle vetoed this bill, noting in her veto message that the measure "disproportionately and inappropriately compensates these lessees of public lands above other lessees of state lands." In addition, she wrote, the bill would require the Board of Land and Natural Resources to "compensate certain lessees for the projected or presumed income losses they would incur on the withdrawn portions of their lease and for the insurance costs they incur." Finally, she noted that the automatic extension provision of the bill "circumvents the authority of the [BLNR] and hinders their ability to ensure that public lands are used for the highest and best public use." The bill was intended to placate lessees who lost part of their leased lands to palila critical habitat. The Legislature did not override the veto in its special session of July. — *P.T.*

