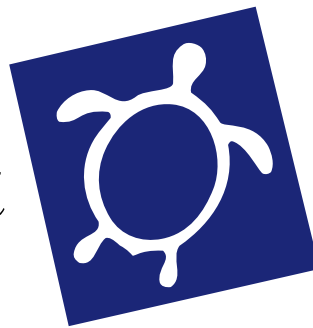


Environment



Hawai'i

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Wipeout at Puako

The Land Use Commission has not often used its power to downzone land it has upgraded into the Urban District, the state's highest and best land use designation. But the owners of 1,000 acres of land at Puako, which were zoned Urban two decades ago, managed to push the LUC into doing exactly this – an action without precedent in recent LUC history.

Just why the commissioners felt they needed to do this is the subject of our top story this month, by Patricia Tummons.

With this issue *Environment Hawai'i* completes 19 years of publishing. As we start our 20th year, we thank all our dedicated readers for their unflinching support.

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A rusted gate bars entry to the Bridge 'Aina Le'a property.

After Years of Delay, LUC Revokes Entitlements for Bridge 'Aina Le'a

Rarely does the tension in a Land Use Commission meeting rise to the level of spine-tingling. But the LUC's hearing April 30 on the fate of 1,060 acres of Urban land owned by Bridge 'Aina Le'a was high drama indeed.

At stake were entitlements to build roughly 2,000 units of upscale resort housing, a commercial center, two golf courses, clubhouses, and other recreational facilities. Along with the entitlements, the first of which were granted nearly 20 years ago, came certain

obligations. At the time of the April meeting, these included: the construction of 385 units of affordable housing; installation of a signal and other improvements to a dangerous highway intersection; and the dedication of land for public schools and parks.

For the last couple of years, LUC members were showing more and more impatience with the developer, Bridge 'Aina Le'a and its Saipan-based parent, Bridge Capital, LLC. Prospects seemed to grow dimmer by the day

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Hearing Office Issues Recommendations For Na Wai 'Eha Contested Case Hearing

In the opinion of hearing officer Dr. Lawrence Miike, no one got it right.

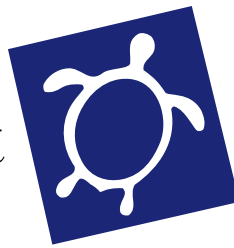
The Maui Department of Water Supply's proposal to amend the interim instream flow standards (IIFS) of four West Maui streams – known collectively as Na Wai 'Eha – directly conflicted with the state Supreme Court's Waiahole I decision.

The reasoning behind Wailuku Water Company, LLC's (WWC) and Hawaiian Commercial & Sugar's proposed IIFS was flawed.

And the stream flows suggested (but not well explained) by Hui o Na Wai 'Eha, Maui Tomorrow Foundation and the Office of

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Environment



Hawai'i

Volume 19, No. 12

June 2009

NEW AND NOTEWORTHY

Finally, Remediation: The U.S. EPA announced May 8 that the state Department of Hawaiian Home Lands will receive a \$200,000 brownfields cleanup grant to remediate a 0.6-acre pesticide mixing and loading site in East Kapolei left by Amfac's long-defunct O'ahu Sugar Company.

The DHHL plans to build affordable homes for Native Hawaiians on about 400 acres, including the contaminated lands, at its East Kapolei II site. In 1989, before the state purchased the land "as is" from Campbell Estate, scientists with the University of Hawai'i found elevated concentrations of dioxins, furans, atrazine, arsenic, and other chemicals associated with agricultural pesticides at the mixing and loading site. But until now, little has been done to remediate the area.

"The target site represents a hurdle to the planned redevelopment of East Kapolei II," the EPA states on its brownfields website.

"Years of pesticide use at the site have left a legacy of contamination that continues to pose a health risk to area residents, farm workers who work the adjacent fields, and the environment. Cleanup of the site will decrease health threats and facilitate the redevelopment project, which is expected to provide about 1,000 affordable homes, 1,000 affordable rental units, schools, and parks for the community."

DHHL will use the grant to construct a geomembrane liner with an asphalt or concrete cap over the site. The state Department of Land and Natural Resources transferred the land to the DHHL in 2004.

(For an in-depth history on how and why the land passed from Campbell Estate to the DLNR to the DHHL, see the July 2001 and November 2004 issues of *Environment Hawai'i*, available at www.environment-hawaii.org.)

More IAL for A&B: On April 6, after winning the first-ever Land Use Commission designation of Important Agricultural Lands (for about 3,000 acres in south Kaua'i), Alexander & Baldwin filed a second petition for nearly ten times the area on Maui, where its subsidiary Hawaiian Commercial & Sugar operates the state's last sugarcane plantation.

A&B is seeking IAL designation for 27,133 acres, 87 percent of which is cultivated by H&CS for sugarcane. Another 6 percent in Waikapu and Hamakuapoko is used for seed corn, pasture, and pineapple, and the rest, the petition states, includes "essential elements" such as gulches "which serve a drainage function" or agricultural infrastructure such as reservoirs and irrigation systems.

Most of the petition area is served by the

East Maui Irrigation Co.'s ditch, owned by A&B, and the westernmost lands are served by the Wailuku Water Company's West Maui Ditch System.

As it did with its Kaua'i IAL petition, A&B has waived any of the credits it would receive under the state's IAL law that would allow the company to reclassify areas equal to as much as 15 percent of the petition area into another district without going through the LUC's normal boundary amendment process.

The LUC plans to conduct a site visit of the petition area on June 4.

Thrips Thrive at West Hawai'i Resorts: He saw it coming and, sure enough, it came. The insect that Maui researcher Lloyd Loope worried would come here and decimate the state's native naio trees is now established on the island of Hawai'i.

Last year, Loope, then a member of the state's Natural Area Reserves System Commission, warned the commission that a New Zealand thrip (*Klamptothrips myopori*) that was decimating species of *Myoporum* in California could easily come here if the state did not step up protections. The commission sent a letter to the Hawai'i Department of Agriculture encouraging it to enact protective restrictions, but none were passed.

Now, "[w]e get to go through this whole thing again," the Hawai'i Department of Agriculture's Darcy Oishi told the state Natural Area Reserves System Commission in April, referring to the swift and near complete devastation the erythrina gall wasp caused to local wiliwili trees a few years ago. Oishi said the thrips, which were first discovered here on March 20, can kill a large naio tree in about four to six months.

So far, the thrips have been found only at a handful of resort communities in West Hawai'i, including Kona Village, the Mauna Lani Resort, the Hapuna Beach Prince Resort, and Waikoloa Village. It is believed the thrips are being inadvertently spread by landscapers.

"Manual removal is out," Oishi said, adding that the state will probably need to use pesticides to control them. "I have a feeling it's spread a little farther than we currently think," he said.

Environment Hawai'i

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Quote of the Month

"We've heard a lot of bull. We just don't want any more coming down the road."

— Ransom Piltz,
Land Use Commission

Hearing Begins on Honolulu's Petition To Change Landfill's District to Urban

Last month, the state Land Use Commission began its hearing on the petition of the City and County of Honolulu to amend the land use district boundary around west O'ahu's Waimanalo Gulch Sanitary Landfill, changing it from Agricultural to Urban. The move would allow the city's landfill, run by Waste Management Hawai'i, to expand and to continue operating after its LUC special use permit expires on November 1.

Although the city is seeking to renew its SUP, it filed the district boundary amendment (DBA) petition late last year as a backup plan should the LUC deny the city a new permit. In March 2008, the LUC extended the expiration date of the city's current SUP from May 1, 2008, to November 1, 2009, giving the city time to finish an environmental impact statement for its proposed 92.5-acre expansion of the landfill. The expansion is estimated to give the landfill about 15 more years of capacity.

Only after the LUC approves either a new SUP or the city's boundary amendment request can the state Department of Health accept as complete the application from the

city and Waste Management for a new solid waste permit, which they submitted in 2007 and updated in 2008. Since May of last year, the landfill has been operated without a state permit, but Hawai'i law allows ongoing operations while an application is pending, so long as the operator abides by conditions of the permit previously granted, the pending application, and all information included in the application.

At the commission's first hearing on the city's boundary amendment petition, held May 14 in Kapolei, the vast majority of public testimony came from Nanakuli residents fearing that, should the city's request be denied, all the waste that now goes to Waimanalo Gulch would be redirected to the PVT landfill in Nanakuli. PVT currently accepts only construction and demolition waste and is considered by neighbors to be a nuisance and a health hazard.

Nanakuli's Kimo Keli'i told the commission that he was once opposed to all landfills on the island, but has since changed his mind. "In doing research regarding the PVT landfill, I've yet to hear from officials where the alternative sites are," he said. City officials have said that the city will cease accepting waste at Waimanalo Gulch should it fail to gain the proper land use approvals by November. Because the ash from the city's H-POWER incineration facility also goes to Waimanalo Gulch, closing the landfill would necessitate closing H-POWER, as well, city officials say.

Keli'i said he envisioned the governor issuing an emergency proclamation to send all of O'ahu's waste to PVT. And in emergency situations, "A lot of things that are supposed to be routine get fast-tracked," he said.

After a number of testifiers raised similar concerns about the use of PVT as a backup landfill, Commissioner Normand Lezy asked one of them, "Has

anybody told you that would be the case?" To which, the testifier replied, "No. That's just my concern."

A small handful of west O'ahu residents testified in opposition to any approval that would keep Waimanalo Gulch open and criticized the city for failing to plan ahead and do more to reduce the need to landfill O'ahu's waste.

"We are dying from Waimanalo Gulch and PVT. PVT is worse... Landfills need to be shut down. That is the total solution," Ma'ili's Lilikina Tom said.

Karen Young, a nurse with the Wai'anae Coast Comprehensive Health Center, also opposed both landfills and said, "It shouldn't have to be a choice [between the two]... As a new testifier, what sticks out is the fear and horror over diversion to PVT. The public deserves to hear from the powers that be precisely what that is all about."

Beverly Munson, who lives below Waimanalo Gulch in the Ko Olina development, argued that the city needs to keep its promise to close the landfill.

"Their answer time and again is, 'We need more time.' I need you to be the body that will hold them accountable... Say to them, 'Time is running out,'" she told the LUC, referring to the multiple extensions of the landfill's permit expiration date.

The state Office of Planning, which is a party to all petitions before the LUC, also opposed the DBA and stated that an SUP would be more appropriate. OP executive director Abbey Mayer pointed out that the city has identified no urban uses for the landfill site after closure and, in any event, would "find it very problematic to use the petition area for any bona fide Urban uses." He added that the proposed use is inconsistent with urban standards, which, as described in state statutes and commission rules, call for city-like concentrations of people and structures. Also, he said that the petition may be the first and only boundary amendment request for a temporary landfill. Finally, Mayer said that the city has not fully pursued efforts to reduce O'ahu's solid waste stream.

Deputy Attorney General Bryan Yee, who represents the OP before the LUC, said that extending the life and size of the landfill would impact a planned mixed-use development, which will include a daycare center, known as Makaiwa Hills. The 2008 unilateral agreement covering the rezoning of the development area requires the city to disclose all potential impacts from Waimanalo Gulch. Changing the land use district to Urban now would preclude the future residents of Makaiwa Hills from commenting on the landfill's impacts, he said.



The City and County of Honolulu and Waste Management Hawai'i plan to blast out and excavate the back of Waimanalo Gulch (pictured here) to provide an estimated 15 more years of life to the city's landfill.

In written comments submitted to the LUC in March, the OP also raised concerns about the city's proposed expansion, which calls for blasting of the gulch's slopes.

"Final design will be modified based on maintaining the stability of all cut slopes. If a mistake is made, however, the continuous blasting and excavation could present significant structural problems in the future," Mayer wrote, adding that excessive leachate combined with the blasting could also create stability problems.

Mayer continued, "Asbestos in the landfill due to inadequate monitoring of waste...raises the concern that leachate from storm events could be contaminated. In addition, a question of whether mercury switches from older cars might have been included in auto shredder residue sent to the landfill by the City and County auto recycling contractor has also been raised, although not yet definitively proven."

City planner Brian Taketa, the city Department of Environmental Services' first witness in the case, sought to rebut the OP's comments, noting that in fact, some landfills do exist in the Urban District. While the 200 or so acres at Waimanalo Gulch would need to remain untouched for 30 years after the landfill closes – to allow for settling and monitoring of leachate and gases – the area could one day be a suitable place for a park or other recreational purposes that are appropriate in the Urban District. He noted that Kaka'ako Waterfront Park and portions of Ala Moana Beach Park are former landfill sites and he listed several parks and golf courses located in the Urban District.

Taketa added that landfills are valuable when there is a natural disaster.

"When you have to clean up large areas [to protect] public health and safety, it would be a severe problem [not to have a landfill] because there would be no place to put the refuse," he said. He added that there are no energy-generating incineration technologies that don't have significant operating problems and/or produce some kind of waste



The Waimanalo Gulch Sanitary Landfill is currently operating without a solid waste permit.



The Ko Olina development, located directly below the Waimanalo Gulch Sanitary Landfill.

byproduct.

In response to the OP's concern that a district boundary amendment would free the city from the need to provide periodic reviews of its operation, Taketa said he did not see why the LUC couldn't require such reviews as a condition of approval.

Gary Takeuchi, an attorney representing the city's Department of Environmental Services, added that the landfill is only one aspect, albeit a critical one, of the city's waste management scheme. He said that the city plans to increase H-POWER's capacity by adding a third boiler. The new equipment, which Takeuchi said would be fully operational by 2012, would allow H-POWER to accept up to 300,000 more tons of waste a year. He mentioned that the city has issued requests for bids to ship waste off island and to development a greenwaste/bioconversion facility. He also said the city plans to take its pilot curbside recycling program islandwide by 2010. (It's unlikely the city will meet that deadline since the City Council cut \$6 million from the program last month.)

When asked by Yee which was more appropriate – a special use permit or a boundary amendment – Taketa said that was a hard question for him to answer because he felt both were appropriate. However, Taketa did say that assigning a deadline to close a landfill is difficult because "there is no way of knowing whether that landfill will be utilized at that date."

The meeting adjourned before intervenors state Sen. Colleen Hanabusa, D-21st (Nanakuli, Makaha), state Rep. Maile Shimabukuro, D-45th (Wai'anae, Makaha, Makua), and the Ko Olina Community Association could question Taketa. But in her opening statements, Hanabusa, who is representing herself, Shimabukuro and the

association, said she had concerns about the proposed blasting, the stability of the landfill's slopes, and the city's overall management of the site. She added that significant cultural features – upright stones and an ancient battleground – are located in and around the area to be excavated.

"We're gonna move [the stones] so the city can blast... We're losing our culture..." she said. "I don't think the city is running this right," she added, referring to the problems the city has had complying with its solid waste permit from the DOH.

The LUC is expected to continue the hearing this month and has not yet decided on whether to grant City Councilmember Todd Apo's petition to intervene in the case. Apo, who supports only a short extension of the landfill's life, represents the Leeward coast.

The city Planning Commission was scheduled to hold a hearing on May 20 on the special use permit request. Hanabusa, Shimabukuro, and Apo are all seeking to intervene in that proceeding as well. Whatever the Planning Commission decides, it will forward its recommendations to the LUC.

— *Teresa Dawson*



For Further Reading

Available at www.environment-hawaii.org:

- ◆ "Resolution of Waimanalo Gulch Violation Case Pushes Limits of DOH Rules, Permit Deadlines" (July 2007);
- ◆ "City, Waste Management Struggle to Renew Waimanalo Gulch Permit" (February 2009);
- ◆ "Auto Scrap Lawsuit Draws Concern Over Metals in Waimanalo Gulch" (February 2009).

Hawai'i County Council Protests Aerial Shoot of Cattle on Big Island

Kelly Greenwell was in high dudgeon. Addressing fellow members of the Hawai'i County on the subject of a resolution he had introduced to protest an aerial hunt to eradicate wild cattle in a state forest reserve, Greenwell fulminated, "This was a thinly disguised African elephant hunt, done for the fun of going up in a helicopter and shooting things."

"Roger, all I can say is your operators have been running wild for a long time. They sneak in... It's plain inexcusable, and an arrogant display of disrespect."

■ *"It's plain inexcusable, and an arrogant display of disrespect." — Councilmember Kelly Greenwell*

The words were directed at Roger Imoto, head of the Big Island office of the Department of Land and Natural Resources' Division of Forestry and Wildlife. Imoto is charged with managing state forest reserve lands, including a relatively recent addition to the Honuaua Forest Reserve, on the slopes of Hualalai above Kailua-Kona.

For years, the area below the original reserve, set aside more than a century ago, had been grazed by cattle belonging to Palani Ranch, owned by the Greenwell family (and now run by Jimmy Greenwell, a cousin to the councilmember). In the early 1990s, the state Board of Land and Natural Resources approved adding Honuaua Tract II to the state forest reserve system, and in 1991, the state ordered Palani Ranch to remove all cattle from the tract.

By 1994, though, cattle were still in Tract II, and the state agreed to let Palani Ranch go on using the area until the state had resources to manage the area. Three years later, the Land Board approved adding the Kealakehe Mauka Tract to the Honuaua reserve.

Not until 2006 was paperwork completed that allowed the formal addition of the lands to the Honuaua Forest Reserve. Still, Palani Ranch was allowed to continue grazing livestock in most of the reserve. It was told, however, to start removing its livestock so the state could begin to reforest the area, using a grant from the U.S. Forest Service.

In 2006 and 2007, Palani Ranch was given permission to trap cattle in the forest reserve in advance of the removal of remaining cattle by DOFAW staff through on-the-ground and aerial hunts. Under terms of an agreement with Palani Ranch, Imoto said,

public hunting of cattle, as well as salvage of meat, would not be allowed. The ranch refused to allow public hunters access to the reserve, citing concerns over the safety of its workers and livestock.

In March 2007, Palani Ranch was given a deadline of January 2008 to remove all its cattle out of the reserve. When it was apparent that the deadline would be missed, DOFAW again extended the deadline. "Trapping permits were extended because we wanted to work with the ranch as much as possible to remove the cattle, and be-

cause we were able to extend our federal reforestation grant," Imoto wrote.

Finally, early this year, Laura Thielen, administrator of the DLNR, approved plans to remove cattle from the reserve by means that included aerial hunts. Even so, in February, Imoto's chronology states, "DOFAW offered to cancel March aerial shoots if Palani Ranch felt it could use the extra month to trap cattle... Palani Ranch wanted the extra time. DOFAW cancelled" the four aerial shoots scheduled for March.

On February 23, Greenwell introduced his resolution, "requesting that the state... abandon any effort and/or plan to eradicate feral cattle within the Honuaua Forest Reserve."

■ *"They didn't go up just because they wanted to have fun." — Councilmember Guy Enriquez*

In the several "whereas" clauses, the resolution stated that the "cattle industry... is economically threatened" and "portrayal of the cattle industry as damaging to our ecosystem" further diminishes its chance for survival. Also, according to the resolution, "the proposed shooting of cattle in recovered pasture land is unacceptably dangerous to hikers and adjoining property owners."

The resolution asked that the state "abandon any effort and/or plan to shoot feral cattle within the Honuaua Forest Reserve" and called for the state to "work with the Cattlemen's Association and various conservation groups to establish a safer, humane, and effective process for achieving success in their mission."

A Matter of Timing

On April 7, the County Council's Committee on Public Safety and Parks and Recreation discussed the resolution. Imoto testified at the time that since 2004, some 381 head of cattle had been removed by ranchers from the nearly 3,000-acre forest reserve. Between 60 and 100 head of cattle remained in the area, according to Imoto's best guess – most of them bulls that were difficult to trap. On a vote of eight to one, with Councilmember Brenda Ford the only "nay," the committee recommended adoption by the council.

A week later, DOFAW began a two-day aerial hunt. According to Imoto, 158 animals were shot from the helicopter, six were shot on the ground, and 23 were driven by helicopter into a pen, where the ranch was able to retrieve the cattle. Altogether, 181 animals were removed from the reserve.

When the County Council met on April 22, on the agenda was Greenwell's resolution. Dozens of ranchers had by then heard of the cattle shoot and provided testimony supporting the measure. Weighing in as well was the Hawai'i Island Humane Society, which had obtained photos taken by Palani Ranch of cattle carcasses left on the ground after the helicopter shoot.

Councilmember Ford noted that one animal was shown with its tongue hanging out, which she said was "prima facie evidence of walking wounded" – of an animal that was not instantly killed but suffered.

Councilmember Guy Enriquez, chairman of the Public Safety and Parks and Recreation Committee, tried to temper the discussion. He said he had been flown

by DOFAW to the area of the shoot ahead of time. "I think they took every measure they could to avoid this result," he said, referring to Ford's accusation of suffering animals. He noted that the Department of Land and Natural Resources had given the ranchers repeated time extensions to get the cattle out, but were coming up against a deadline for the Forest Service grant.

When he saw the forest reserve lands, he said, his first thought was, "Whoa, there's a lot of cattle here."

"I want to support Mr. Imoto. They didn't go up just because they wanted to have fun. I want to let my colleagues know they did what they could," he said. According to Imoto, it is far more humane to shoot animals from helicopters than it is from the

ground. If a shot misses, it's possible to follow the animal and quickly deliver a killing shot, whereas if a badly wounded animal runs away from a hunter on the ground, it is far more likely the animal will suffer a lingering death.

New Agreement

The resolution was adopted by a unanimous vote. Since then, Imoto told *Environment Hawai'i*, DOFAW has been in discussions with the ranch, which has now agreed to let the state drive remaining cattle into adjoining pastures using the helicopter. The state had offered since 2004 to drive the cattle in the reserve with the helicopter, Imoto said, but the ranch had refused. "They thought it might destroy fences," he said, "but now with the public pressure on, they're easing up and say they will let us use that technique."

As far as giving hunters access to the reserve, though, Imoto said, "the ranch is adamant about not allowing public hunting."

— *Patricia Tummons*



For Further Reading

Environment Hawai'i has reported extensively on the damage that cattle have done a continue to inflict on Hawaiian forests. In 2002, we devoted three consecutive issues to the topic. Taken together, the articles provide a comprehensive history on the subject, going back to the initial introduction of cattle to the islands by Captain George Vancouver in 1793 and continuing into the present.

All those articles in our online archives: www.environment-hawaii.org.

The articles contained in those three issues – September, October, and November 2002 – have been reprinted as a 24-page booklet. Several copies are still available (at a cost of \$5.00 each) and may be ordered from the *Environment Hawai'i* office.

Charge-card orders may be placed by calling our toll-free number: 877 934-0130. Mail orders should be accompanied by check and sent to *Environment Hawai'i*, 72 Kapi'olani Street, Hilo HI 96720.

Puako from page 1

that Bridge 'Aina Le'a, the current landowner (the fourth since redistricting occurred), could meet a November 2010 deadline to have in hand certificates of occupancy for the affordable units. In September 2008, the LUC approved a show-cause order requiring Bridge to explain why the land should not be placed back into the Agricultural District.

After two hearings on the order – the first in January, the second in April – the LUC had heard enough. After a five-hour-long meeting, interrupted by two executive sessions, a lunch break, and a couple of courtesy breaks to allow Bridge's attorney to huddle with his clients, the commission voted unanimously to revert the land to the state Agricultural District.

At that moment, the meeting room at the Waikoloa Marriott was dead still. You could almost hear the value of the land, not five miles from the hotel, shattering into smithereens.

'More or less the landowner'

That was hardly the outcome that Bridge had anticipated. In March, Bridge had given the commission notice of its intent to sell the land to DW 'Aina Le'a, a Nevada limited liability corporation. DWAL was no stranger to the commission. In the summer of 2007, it had been identified by Bridge as a development partner, yet shortly thereafter, the company dropped from sight and progress toward meeting the affordable housing deadline – the condition that the commission was most eager to see fulfilled – once more stalled.

Documents that Bridge submitted in March indicated that Bridge and Robert Wessels (the "W" in DW) had signed a purchase and sale agreement more than six months earlier, in September 2008. Yet when Bridge filed its required annual report for 2008 in November, the agreement to sell the land was not mentioned.

Moments before the April meeting was to begin, commissioners received a tabbed binder containing about two dozen documents. They included contracts (mostly unsigned) between DW and other parties, a sort of prospectus that DW had prepared for potential investors, and architectural drawings of possible affordable housing units. Also included were materials relating to DW's negotiations with the County of Hawai'i to build offsite transitional housing – negotiations that, in the end, had led nowhere. (As reported in the March issue of *Environment Hawai'i*, in January, Bridge 'Aina Le'a had originally proposed that the commission allow it credit against its affordable housing

obligations for each unit of county transitional housing it built. In February, DW 'Aina Le'a replaced Bridge in the talks with the county.)

The commissioners, accustomed to receiving exhibits and motions days, if not weeks, in advance of their meetings, were bewildered – and obviously displeased. The first question that was posed by Commission Chairman Duane Kanuha expressed their confusion. "Petitioners," he said, "we're trying to determine who the actual petitioner is... We have Bridge 'Aina Le'a's notice of intent to assign their interests in the petition area to DW. But nevertheless, for the record, Bridge 'Aina Le'a is still the petitioner."

Michael Carroll, an attorney with the Honolulu firm of Bays Deaver Lung Rose & Holma, responded for Bridge. "DW has taken over development responsibilities pursuant to the purchase and sale agreement," he said. "They're in charge of development, and Bridge 'Aina Le'a is more or less the landowner. Since [DW] are taking over, we'll be stepping out and they'll be taking the lead."

Attorney Eric T. Maehara was also at the table. Maehara, familiar to commissioners as the lawyer who had most frequently represented Bridge, said that he was now representing DW.

Commissioner Reuben Wong then asked, "If Bridge 'Aina Le'a is the petitioner, and Mr. Carroll represents Bridge, what is Mr. Maehara doing at the table?"

"In a normal case," Maehara replied, "if we weren't facing the order to show cause, it'd be a matter of Mr. Carroll introducing DW to the commission ... and formally ask[ing] for a substitution of petitioners. But because we're in this situation, with the order to show cause, that's why we have this dichotomy. There's no clear line. Bridge, through Mr. Carroll, will make a statement. After that point, then I would indulge [sic] the commission to allow me to continue making the case for DW 'Aina Le'a to prove its capacity to hit the ground running and attempt to meet all these conditions that the commission has set down in the past."

'Who's on first?'

The commissioners were not inclined to go along with Bridge's script. Commissioner Normand Lezy explained: "The order to show cause was issued against the petitioner Bridge as the entitlement holder in this matter. Bridge 'Aina Le'a is obligated to show cause today why there should not be reversion. As far as I know, nothing has been brought before the commission to show that any other entity, whether it be DW 'Aina Le'a or anybody else, has an interest or authority to

make representations on behalf of Bridge in connection with the order to show cause.”

Carroll had earlier acknowledged that he was “not as familiar with the current status” of the case as Maehara, prompting Lezy to ask, “Is there somebody, an entity, that is here today that has agency authority on behalf of petitioner Bridge ‘Aina Le‘a to make a presentation and respond to the order to show cause?”

Maehara tried again to push DW forward as the party to which questions should be addressed: “In the purchase and sale agreement, the responsibilities of maintaining entitlements have transferred from Bridge or is [sic] in the process of being transferred, as well as title to the property, to DW.”

Lezy cut him off. “You just said, either has been done or is in the process of being done. What is the current status as we sit here today?”

Maehara replied by reading from the purchase and sale agreement language that authorized DW to assume “development responsibility” before closing on the property. “That, I believe, is the authorization,” he said.

Commissioner Ransom Piltz was not satisfied with Maehara’s effort to substitute DW for Bridge. “Mr. Maehara, you have to understand, the commission has received this... and it causes a lot of confusion as far as who’s on first and who’re the players and everything. But essentially we’re looking at Bridge ‘Aina Le‘a and not DW... So you have to understand, all we’re going to deal with today is Bridge ‘Aina Le‘a. ... if they’re not here, then this session is over.”

Maehara asked for a short break to consult with the principals of both Bridge and DW. When the session resumed, Carroll said he would speak for Bridge. Several commissioners observed that the lawyer making filings on Bridge’s behalf had been Maehara, with Carroll a relative stranger to the commission. Carroll then suggested Maehara could act as his co-counsel, an arrangement that seemed to settle the question of representation.

‘A lot of bull’

The first witness called by Maehara was Sidney Fuke, a planner who had been working with Bridge for years but who had recently been retained by DW.

Maehara’s first question to Fuke concerned DW’s taking over from Bridge negotiations with Hawai‘i County over construction of transitional housing at Kaloko, a site some 20 miles away. Fuke commenced with a history of the site going back nine years. Bryan Yee, the deputy attorney general representing the Office of Planning, questioned the relevance.



Coral graffiti marks a memorial to the victim of a recent auto accident near the intersection of the Bridge ‘Aina Le‘a property access road and the Queen Ka‘ahumanu Highway. Opposite the Bridge road is the entry to the Mauna Lani resort.

Maehara acknowledged that the subject “may have little relevance to the issue at hand,” especially since DW’s involvement with the project was now off the table, but nonetheless asked that the documents concerning the Kaloko transitional housing be accepted into evidence.

Yee again objected, as did Commissioner Lezy. “I don’t see how this evidence has any bearing or will lead to anything that has any bearing on the issue before us,” he said.

Maehara then began questioning Fuke about DW’s plans to fulfill the on-site requirement for affordable housing, calling his attention to an easel displaying a map of the property, showing a 60-acre “scallop-shaped” lot near the southeast corner of the Urban area where the 400 or so affordable units were proposed to be built.

Commissioner Wong protested. “I have a problem. Mr. Fuke stated he represents or is a consultant for DW, and no longer for Bridge,” Wong said. “If so, it’s not relevant to us what DW is going to do in the future. So I’m wondering whether or not all this testimony has anything to do with Bridge ‘Aina Le‘a?... Unless there’s a showing that DW owns the property today, I’m not interested in what DW wants to do because it’s not relevant to this proceeding.”

Maehara said he would try to “convince the commission of the fact that DW has the wherewithal, past experience, the financial capabilities to step in place of Bridge ‘Aina Le‘a.”

Commissioner Piltz responded: “Those of us who have sat on this commission throughout some of the promises that Bridge ‘Aina Le‘a has made, we bring you this dilemma... We’ve heard a lot of bull. We just don’t want any more coming down the road – that we’re

going to do this, we’ve got a thing that isn’t completed yet with DW. Why should we believe what’s going on? You’ve not proven yourself in the past. Granted, everybody wants to get affordable housing, but your clients have not done their job. We’re skeptical about what’s going on here.”

‘A troubling indicator’

Maehara said he was attempting to show, “under oath, that there have been considerable sums of money transferred from DW to Bridge, substantial amounts already paid out to consultants...”

Wong wanted to know, again, whether DW had “actually acquired all of the rights of Bridge?” Or did it merely “hope to acquire it some day in the future?”

Maehara acknowledged DW had no legal title, but again argued that “DW has assumed responsibility of proceeding with all entitlements and all other proceedings.”

Commissioner Lisa Judge pointed out that while there is no legal requirement that the LUC approve in advance any transfer of the land, “it is in our conditions that petitioners are supposed to inform the commission of their intentions to transfer property. One of the things that troubled me when I started to look through these documents, this has been going on back to September 2008. Since then, there was a status report from the petitioner, where none of this was mentioned. At a hearing in January... no mention of intent to sell the property was ever hinted at or disclosed to the commission at that time.

“Now, on March 20, we get all these documents that date back to September 2008... Many of these documents are unsigned, I don’t know what weight we give them when they’re unsigned. That to me is a

troubling indicator of the process we've followed for the last four years."

Chairman Kanuha asked Maehara if any representative of Bridge was going to be testifying.

Maehara: "We intend to follow Mr. Fuke with Mr. Robert Wessels, who is a principal in DW. And then follow with a representative of Goodfellow Construction."

Kanuha: "So the answer is 'no.' You're not intending to call any witness relating to the petitioner."

Maehara: "We had no intention of calling any witness who is a principal or officer in Bridge 'Aina Le'a, but if need be, we can submit authorization of Bridge for these persons to submit testimony."

'Hopes and dreams'

After lunch, Maehara explained how he and his clients "had a long discussion as to how we're going to proceed." He set forth a new list of witnesses, beginning with Hoolae Paoa, the CEO of Bridge 'Aina Le'a, and then Fuke again, followed by other witnesses. "It's important that we clear the air, [explain] what this transaction, the purchase and sale agreement, is all about, the relationship of the parties, have that all resolved," Maehara said.

Before he could proceed, Commissioner Wong asked for an "offer of proof, what are all these witnesses going to testify to. Give me a roadmap as to where we're going."

Maehara answered that he would be making the argument that "DW in fact is in a position to meet the conditions, specifically the [affordable] housing condition that is a concern to this commission."

That wasn't good enough for Wong. "Being that we're here on an order to show cause, I'm asking the petitioner to appear and demonstrate why the order for reversion should not be granted... The construction you're proposing is only one component." All the things Maehara was proposing to show, Wong continued, were "hopes and dreams and things we aspire to accomplish," but they did not "address the issues of the order to show cause." Wong wanted to know the reasons why Bridge had not met the conditions of the LUC's decision and order, amended several times over the years, associated with the Urban reclassification. "It could" he suggested, "be natural disasters, pandemic, tsunamis," that prevented the petitioners from doing "all the good things we said we were going to do."

"The offer of proof," Wong continued, "does not address this... It merely talks about the hopes and dreams and things that we want to accomplish. Those are not the issues before the commission. In view of that, I

move that the petition area in this docket be reverted to agriculture."

Maehara, Carroll, and their clients present in the meeting room appeared shocked by the suddenness of Wong's motion. Kanuha offered Carroll the chance to make a statement before the commission's vote, and then granted Carroll a five-minute break in which to talk things over with his clients.

When the meeting resumed, Carroll said his clients strongly objected to any reversion. "It's procedurally improper," he said. "We haven't had the opportunity to make our case... We've not had an opportunity to explain" the March 20 disclosures. "We've got vested rights, have spent \$20 million. We have the ability to go forward with the project."

In further discussion on the motion, Commissioner Judge asked Hawai'i County Planning Director Bobbi Jean Leithhead-Todd what she thought were the prospects for completing work on the affordable housing by November 2010. "We're talking now less than 18 months. Do you, in the county's opinion, believe you can get certificates of occupancy for 385 units, given the status of development at this point?"

Leithhead-Todd stated she wanted to give the developers the benefit of a doubt. "Given the status of development at this point, it'd probably be very difficult," she said. However, she continued, "I'd like to give them until November 2010 to deliver. Whether they can do it, I don't know... I don't see any harm in giving them that opportunity."

Commissioner Lezy asked Leithhead-Todd to "handicap" the odds of fulfilling the affordable housing condition by the November 2010 deadline. "Can you give me a numerical probability, say 50 percent?" he asked.

Leithhead-Todd agreed that the odds were probably no greater than that.

Carroll restated his objections to the reversion, adding, "It's a violation of our fundamental rights." After 2005, when the LUC imposed the 2010 deadline for affordable housing, he said, "the Superferry decision came out, which impacted our progress."

Commissioner Judge recapped some of the recent history of LUC actions on the Bridge docket. "I feel like we keep going in this circular motion, for those of us who sat through those several meetings in 2005, ... we were told there were no further discretionary permits needed, no changes of zoning, 'Please, just get out of our way, we have machines on site, just get out of our way.' ...

"Even then, there was a level of skepticism... That's why the [housing] condition was written the way it was."

The issue before the commission was more

than "just about affordable housing," she said, and instead went to the heart of the commission's basic process. "This has been ongoing since 1989.... Promises were made of benefits to the community. Just one was affordable housing."

"At the last commission meeting," Judge continued, referring to the January hearing on the show-cause order, "it was disclosed by petitioners' representative that, no, we're not going to do sewage, no, we're going to do something totally different. That was disturbing to me, in the sense that we made agreements. If nobody is going to live by them, why spend all this time and effort to do this?"

"So I'm all for affordable housing, we'd love to have affordable housing, but there are a lot of layers to this.... All the other promises made in 1988 and 1991, and nobody's even talking about that."

Carroll asked for a chance to confer with his client before the commission voted. Kanuha said he'd already had the opportunity.

Without further ado, the commission voted 7-0 in favor of reverting the land to the state Agricultural District.

For the next few weeks, said Dan Davidson, executive director of the LUC, the state Attorney General's office will be drafting the formal order of reversion. After that is signed, Bridge will have the opportunity to ask the commission for reconsideration.

— *Patricia Tummons*



For Further Reading

Much more background on the Bridge 'Aina Le'a project may be found in past articles published in *Environment Hawai'i*. These include:

- ◆ "Bridge 'Aina Le'a Gets a Drubbing from the Land Use Commission" (March 2009);
- ◆ "Affordable Housing Agreement Could Give Bridge Two Credits for Each Unit Built" (March 2009);
- ◆ "Hawai'i County Board Deals Setback to Stalled Bridge 'Aina Le'a Project" (December 2008);
- ◆ "Two Decades and Counting: Golf 'Villages' at Puako Are Still a Work in Progress," and three related articles (March 2008).

All articles are available on our website, www.environment-hawaii.org. Current subscribers qualify for free access to our archives. All others are asked to pay \$10 for a two-day pass.

Citing Frustrations, 2 More Members Resign in May from Environmental Council

Last month, the state Environmental Council lost two more members. The resignations brought to four the number of members quitting in disgust this year. On May 4, David Bylund, chairman of the council's annual report committee, submitted his resignation letter to Governor Lingle, describing the council as "too politicized, undermined, and ineffective." One week later, Wade Lord informed the governor that he, too, was stepping down.

Earlier this year, council chairman Robert King and member Christopher Steele resigned, citing the lack of support for the council's work by the administration of Governor Linda Lingle. (King's resignation was reported in the May issue of *Environment Hawai'i*.)

Bylund was chairman of the council's annual report committee. In 2007, the theme of the report was environmental justice, selected largely at the suggestion of the Legislature. "I was dismayed and upset to discover that your office did not release the Annual Report because you did not agree with some of its contents," Bylund wrote Lingle. "Your office did not inform the Council of your decision not to distribute the report."

In 2008, the council's annual report focused on the theme of food security and self-sufficiency. This time, the governor's office supported the theme, but when the time came to prepare and distribute the report,

Bylund wrote, "the staff support in the Office of Environmental Quality Control had disappeared. This situation required our committee and OEQC Director Kathy Kealoha to try to take over their tasks. One of the requirements for the Environmental Council is to 'monitor the progress of state, county, and federal agencies in achieving the state's environmental goals and policies.' We were unable to gather agency information because of the lack of staff support." For the 2009 report, Bylund continued, "it is clear that there continues to be no staff support and there are no funds for the production of the report."

Lord mentioned in his list of grievances the lack of progress in amending council rules, the suppressed annual report, and insufficient staff support, among other things. Both he and Bylund echoed a complaint made by the council chairman Robert King in his resignation letter of April 7 concerning inadequate meeting facilities. King had objected to ever-smaller meeting rooms and video-conference facilities that were dysfunctional.

The video-conferencing was intended to reduce travel costs, Lord noted, and, "while this seemed like a reasonable alternative, it has been wholly inadequate. The equipment consistently malfunctions and there is no technical support... In the several meetings I have attended via video-conferencing, we have yet to have a single meeting wherein the equipment worked."

Wrote Bylund, "the council was happy to embrace video-conferencing for our monthly meetings. However, the result is our being relegated to inadequate basement training rooms, too small for our council meetings, much less to welcome public participation. In addition, there has been no technical support in O'ahu and on the neighbor islands."

The council members "are good people, donating their valuable time and expertise to help make Hawai'i a better place," Lord wrote. "They do not, and I do not, deserve to be treated this way."

Bylund's parting words were more damning: "The only conclusion I can reach is that the [Department of Health] and your office find no value in the Environmental Council."

Steele was the first council member to resign this year. In a phone interview, Steele said he had "worked long and hard for years to have the opportunity to sit on the council." His resignation, he added, "was not an easy decision," but there was an "absolute lack of support. It felt like no one wanted anything to do with us. They treated us like a lost stepchild."

At full strength, the Environmental Council has 15 members. According to a staff person, there were no new appointments this year and no members whose terms expire at the end of June. The council approves agency exemption lists (lists of actions that do not trigger preparation of an environmental assessment or environmental impact statement) and promulgates rules to implement the state environmental policy act, Chapter 343 of Hawai'i Revised Statutes.

— *Patricia Tummons*

NWE from page 1

Hawaiian Affairs failed to strike a balance between instream and offstream users.

These conclusions, among many others, are included in Miike's 200-plus-page recommended findings of fact, conclusions of law, and decision and order for the state Commission on Water Resource Management contested case hearing involving 'Iao, Waikapu, and Waiehu streams and Waihe'e River. Miike, who also serves on the commission, issued his recommendations on April 9.

The contested case hearing, which began in late 2007, was initiated by Hui o Na Wai 'Eha and the Maui Tomorrow Foundation. Prompting them were concerns that Wailuku Ditch owner WWC, which had ceased using its ditch water for agricultural uses and had instead begun to sell it, was monopolizing a

public trust resource for private gain. And so, in 2006, the two groups, represented by Earthjustice, filed a petition to amend the IIFS of Na Wai 'Eha.

Predictably, when it came time for the parties to make their recommendations to Miike, the Hui and Maui Tomorrow, joined by OHA, recommended that the commission require the return of most of the diverted water back into the four streams – more than 50 million gallons a day. It was also no surprise that HC&S, the largest single offstream user of Na Wai 'Eha water, proposed returning the least amount of water – less than 4 mgd for Waihe'e River and Waiehu Stream only. Wailuku Water Company also recommended returning a very small amount – only a portion of the lowest recorded flows in each stream, or roughly 10 mgd. Maui County did not specify any amount that should be re-

turned, only what it thought should be given to reasonable and beneficial offstream uses.

In the end, while he disagreed with the amount proposed by the Maui community groups and OHA, Miike supported their desire to see mauka-makai flows restored and recommended that more than half of the water that has been traditionally diverted be put back. Absent the diversions, the flows of the four streams combined would come to at least 66.9 mgd, about 54 mgd of which comes from groundwater percolating up through the streambed. Instead of allowing WWC to continue to divert its recent historical average of about 50 to 60 mgd, Miike recommended that the Water Commission amend the IIFS below the uppermost diversions to allow 34.5 million gallons of water a day to flow into the streams.

To allow for natural losses through the

streambed and to make sure some amount of water always reaches the ocean, Miike set separate IIFS for various points in the streams, requiring a minimum flow of 10 mgd at the mouth of Waihe'e River, 1.6 mgd at the mouth of Waiehu, and 6.7 mgd at the mouth of 'Iao stream.

For Waikapu Stream, Miike recommended a temporary release of 4 mgd to test whether or not water would reach Kealia Pond. If it does not, or if the additional flow has no effect on recruitment of amphidromous organisms (stream species that spend part of their life cycle in the ocean) in the stream, Miike recommended that there be no IIFS at or below the main diversion.

"[E]stablishing continuous stream flow from mauka to makai provides the best conditions for re-establishing the ecological and biological health of the waters of Na Wai 'Eha," he wrote, adding that while restoration can't fix all of the degradation to stream ecosystems, "flow restoration is the instrument available to the Commission."

The decision, if adopted by the Water Commission, would be a boon to the streams' ecosystems, Native Hawaiian cultural practitioners, and kuleana landowners. Miike admits that his recommended IIFS will result in days when no water is available for offstream uses, even if they are reasonable ones. He adds that had he accepted the Hui and Maui Tomorrow's proposals, no water would be available for offstream use – which includes kuleana and domestic water use – between 15 and 35 percent of the time.

Water Use Permits

In addition to dealing with the IIFS of Na Wai 'Eha, the contested case hearing also addressed water use permit applications filed by the county, HC&S and WWC for diked, high-level well and tunnel sources within the 'Iao watershed. For these, Miike recommended that the Water Commission grant a permit to the Maui DWS for 1.042 mgd from a well at Kepaniwai and 1.359 mgd from the 'Iao tunnel.

Miike recommended that HC&S receive a one-year permit for 0.1 mgd from 'Iao tunnel, during which time the company must provide proof of the actual amount of water used. If HC&S needs longer than one year, Miike recommended that the commission could continue issuing one-year permits for up to five years, at which time the commission would have to make a final determination on the permit.

Miike recommended denial of Wailuku Water Company's permit applications for three tunnels that discharge into 'Iao stream. (Miike added that WWC's permit applica-

tion for .227 mgd from the portion of 'Iao tunnel that it shares with the MDWS is incomplete and not part of the contested case hearing.)

'Reasonable' Uses

As a result of the Hawai'i Supreme Court's decision regarding O'ahu's Waiahole irrigation ditch system, all offstream users in designated water management areas must prove that their uses are reasonable and beneficial by providing details on "acres to be used, the crops to be planted, and the water needed as to each group," Miike wrote in his decision, adding that absent such basic information, an offstream user cannot meet its legal burden.

In their opening briefs, the Hui and Maui Tomorrow had argued that Na Wai 'Eha's stream diversions leave large sections of the streams dry, and that this, in turn, affects aquifer recharge, stream organisms that need continuous flow to the sea, as well as Native Hawaii traditional and customary rights, riparian and appurtenant rights, and the rights of kuleana landowners. What's more, they and OHA claimed that HC&S and WWC were wasting a significant amount of water without any justification.

To determine how much water should be allocated for the various uses, Miike first had to determine which ones were reasonable. The following is a summary of his findings for some of the major uses:

HC&S: Regarding claims by the Hui, Maui Tomorrow, and OHA that HC&S was wasting water or overwatering their fields, Miike found that, based on models and expert testimony on the water requirements of sugarcane, HC&S's water use has not been particularly wasteful. Although he did find that HC&S was overwatering some fields, he also found that for others, based on various estimates of sugarcane requirements, HC&S did not water them enough. He did find, however, that the sugar company has access to alternate sources of water and could also significantly reduce its system losses by lining its reservoirs.

WWC: With regard to the water delivered by WWC under its various Water Delivery Agreements, Miike did not seem satisfied with the evidence the company provided on the end use of the water. Miike stated that the company's table of 34 customers provided no information on acres cultivated or on the nature of use, "except to label them generally as either 'agriculture' or 'irrigation.'" For WWC users, not including MDWS and HC&S, total use was 2.37 mgd in 2006, out of a total of maximum amount allowed by its contracts of 8.288 mgd.

Kuleana uses: With regard to taro cultivation, Waiahole taro farmer Paul Reppun, a witness for Hui o Na Wai 'Eha, testified that 300,000 gallons a day of water must be consistently available to grow healthy taro. On average, Miike calculated that the kuleana users who are using or seek to use Na Wai 'Eha water receive about half that, between 130,000 and 150,000 gallons per acre per day (gad) for their lo'i, which translates to about 260,000 to 300,000 gad, considering that for the 50 percent of time, no water is needed to flow into a lo'i. These amounts, Miike wrote, would be sufficient for proper kalo cultivation, but added that much of the water reported by WWC as being delivered to kuleana lands is being lost in the system between the lands and WWC's ditches and reservoirs.

Stream organisms: With regard to instream uses, Miike noted that Hui o Na Wai 'Eha's and Maui Tomorrow's expert witness argued that contiguous mauka-makai flow is necessary for amphidromous organisms – native fish (o'opu), shrimp (opae), and limpets (hihiwai) – to thrive, while HC&S's expert stated that such flow is not needed to have "ecological connectivity," because even intermittent streams in known dry areas maintain populations of amphidromous species. Miike concluded, "Ultimately, the precise volume and duration of stream flow needed to sustain the life cycle of amphidromous organisms is not known."

Wetland restoration: Miike seemed to side with HC&S with regard to the Maui Coastal Land Trust's request for increased flow into Waihe'e River. MCLT, which owns three kuleana parcels bordering the Kapoho Wetlands, had requested releases into Waihe'e River to bring the water table up 18 inches, which its expert said would provide for better habitat and improved conditions in the refuge's fishpond. HC&S' groundwater expert, however, said the same result could be achieved by drilling a well.

Domestic use: Miike found that Maui County's municipal water supply could not be significantly augmented by groundwater from Central Maui's Waihe'e and Waikapu aquifers and that a December 2003 consent decree in the case of *Coalition to Protect East Maui Water Resources v. Board of Water Supply, County of Maui*, requires the county to look to the hydrologic units in Na Wai 'Eha before developing ground water in East Maui.

Considering all of the research and expert testimony submitted during the hearing, Miike concluded that "total reasonable current and future uses for all diverted stream waters are 37.19 mgd to 39.52 mgd: 1) 0.68 mgd to 1.71 mgd for consumptive use by kalo [taro] lo'i; 2) 12.2 mgd for MDWS; 3) 2.02 mgd for

BOARD TALK

Boat Mechanic Gets Permit to Fill Acre Of Submerged Lands at Ke'ehi Lagoon

WWC's Water Delivery agreements; 4) 2 mgd for WWC's system losses; and 5) 20.29 mgd to 21.59 mgd for HC&S." He added that if the total flow-through requirements and not just the consumptive use of taro is included, total "reasonable" use would increase to between 43.35 and 44.65 mgd.

"Most of these additional amounts, however, would have to be returned into streams downstream of the diversions to the lo'i," he wrote.

What's next?

It will probably be months before the Water Commission decides how the water is eventually allocated, since parties to the contested case submitted their exceptions to Miike's findings, decision, and order just last month. But it's clear from filings with the Water Commission that some users aren't very happy with Miike's decisions. HC&S, for example, wrote in its exceptions, "Had the proposed IIFS for Waihe'e Stream been in place in 2008, for more than 4 out of every 5 days, there would have been no Waihe'e Stream water available for use by HC&S at all and insufficient water for MDWS' proposed Waialae Water Treatment Plant to operate at its 9 mgd capacity."

After the Water Commission rules on the case and sets new IIFS for Na Wai 'Eha, it will then have to deal with the surface water use permit applications for what's left. According to Water Commission staff, more than 100 applications were submitted earlier this year by kuleana users, various private companies, the Maui DWS, WWC, HC&S, and others for permits for existing uses. — **Teresa Dawson**

*For Further Reading*

Environment Hawai'i has published several articles that will provide additional background to the current dispute over West Maui surface water:

- ◆ "Commission Struggles with Conflicting Claims Surrounding West Maui Stream Diversions" (February 2006);
- ◆ "Commission Orders Contested Case, Mediation for Maui Water Disputes" (March 2006);
- ◆ "Finally, a Schedule for Contested Case over Charge of Wasting Maui Stream Water" (January 2007);
- ◆ "Hearings Begin in Contested Case over Diversion of West Maui Streams" (December 2007);
- ◆ "Commission Tightens Grip on Waters of Central Maui" (May 2008).

Because the boat building and repair shop of Honolulu Marine, LLC (HM), doesn't conform to the Hawai'i Community Development Corporation's plans for Kaka'ako, the agency is kicking the company off the Kewalo basin property it has leased from the state since 1986. HM, according to a report by the Department of Land and Natural Resources, builds, repairs and maintains vessels owned by P&R Water Taxi, Ltd., the U.S. Navy, and "other government and private parties involved in marine research, fishing and commercial tugboat and barge services."

On May 8, the state Board of Land and Natural Resources unanimously approved a new home for the company when it granted it a Conservation District Use Permit for 40,300 square feet of submerged land at the south end of Ke'ehi Small Boat Harbor along the Kalihi Channel. The board also approved an extension to an approval in principal for a limited right-of-entry and a direct lease to HM for 1.11 acres of fast land, 0.53 acres of fill land, and 0.48 acres of submerged land.

"This is a substantial project in the Conservation District," Office of Conservation and Coastal Lands administrator Sam Lemmo told the Land Board. A report by OCCL planner K. Tiger Mills states that the company plans to fill 23,000 square feet of the permit area to provide space for boat construction and to allow boats to move from a 120-foot long floating dry dock onto the

facility. HM also plans to build a 135-foot long pier and a two-story building. The entire project will cover about 2.2 acres.

Although fishing in the area would need to be prohibited, Mills stated, a shoreline access easement will be maintained. Mills added that because the project will probably impact live coral colonies, the DLNR's Division of Aquatic Resources is requiring a coral protection plan.

Lemmo told the Land Board that, in this case, filling submerged lands in the Conservation District land was acceptable because they are located in the heavily industrialized Sand Island area.

"We're okay with it from that perspective," he said, adding that the federal permits HM will need to obtain will have stringent water quality guidelines and that any effects the work will have on natural resources and uses in the area can be mitigated.

Although the DAR and the state Office of Hawaiian Affairs both expressed concern about how a sea level rise of three to five feet might affect the facility once it is built, HM noted that sea level rise estimates vary widely and "there are no public policy guidelines or regulations that have been put into place to assist industry or to guide the development of coastal dependent facilities. Therefore, Honolulu Marine has planned for the use of the site based on the existing regulatory framework for uses within the Honolulu Harbor."



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Under the approved CDUP, HM has 18 months from the May 8 approval to begin construction. The City and County of Honolulu granted HM a Special Management Area use permit for the project in November and a final environmental assessment for the project was accepted by the Department of Land and Natural Resources in February 2008.

Koa Logger Agrees To Fines, Restoration

When cowboys built a boundary fence separating Parker Ranch land from the state's Hilo Forest Reserve many decades ago, they strayed from the actual property boundary, which crossed steep terrain, and took an easier route. And because the fence was mislaid, a Mountain View, Hawaii, company salvaging koa from the ranch accidentally took 32 trees from about 50 acres of the reserve in September 2005.

Steve Bergfeld, a forester with the DLNR's Division of Forestry and Wildlife, discovered the infraction in June 2007 while he and colleague Bob Otomo were inspecting the old boundary fence with Parker Ranch's Brandy Beaudet. At the Land Board's April 24 meeting, DOFAW staff recommended that Jay Warner of Awapuhi Farms and Mill of Mountain View pay a fine of \$57,946, which includes \$4,300 in administrative costs and, based on the commercial value of the wood taken, \$53,648 in damages.

Although DOFAW proposed a large cash fine, it also recommended that in lieu of paying that fine in full, Warner could conduct site maintenance and construction work

equivalent to a discounted fine value of \$26,000. In addition, DOFAW directed Warner to conduct koa reforestation on about 25 acres within the affected area.

Maui Board member Jerry Edlao said he was disappointed that Parker Ranch had mislaid the fence and encroached state land, but was not being penalized. DOFAW's Michael Constantinides said that, with regard to the koa logging, his office had discussed the matter with the Department of the Attorney General and, "they said that the recourse must be with the actual party that did the on-the-ground work." When Big Island board member Rob Pacheco asked whether the fence would be removed, Constantinides said that it is in a "pretty broken-down state," and that he would not recommend removal. In any case, board member Sam Gon said, the fence was not the main issue before the board and would have to be taken up later with Parker Ranch.

In the end, Warner, who said he was "just as surprised as anybody" that he was logging state land, did not contest the penalties proposed and approved by the board. Board member Tim Johns, who sits on Parker Ranch's board of directors, recused himself from voting on the matter.

Forest Preservation Projects Win Permit, Funding Approvals

At its May 8 meeting, the Land Board approved the renewal of Natural Area Partnership Program (NAPP) funding for The Nature Conservancy of Hawaii's Kapunakea preserve in the West Maui mountains. It also approved a Conservation District Use Permit to TNCH for various protection activities within the 1,264-acre preserve. The board agreed to provide the preserve with \$781,880 in NAPP funds for fiscal years 2010 to 2015 and also authorized board chair Laura Thielen to

negotiate and enter into a NAPP contract for TNCH's Pelekunu preserve, with funding to be provided "subject to annual availability of funding and annual budget execution procedures and approvals."

At the same meeting, the Land Board approved an agreement giving the Waikoloa Village Outdoor Circle \$465,381 in state Forest Stewardship funds over ten years to conduct dry forest restoration on 275 acres in Waikoloa.

Morgan, Goode Replace Board Members Schuman, Johns

In April, the state Senate confirmed two new Land Board members to replace outgoing O'ahu representative Taryn Schuman and at-large member and former board chair Tim Johns, who had been on the Land Board for nearly ten years and served the maximum number of consecutive years (eight) a board member can serve.

Kualoa Ranch Hawaii president John Morgan will fill Schuman's seat after her last meeting in June, while David Goode, a former director of Maui County's Department of Public Works and Waste Management, will complete Johns' term, which ends June 2010. Goode, who is currently president of real estate development firm KSD Hawaii, attended his first Land Board meeting May 8.

— T.D.



David Goode



Tim Johns

