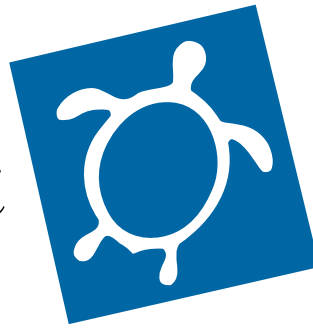


Environment



Hawai'i

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A Plugged Drain, A Heavy Rain

That pretty much sums up the conditions that led to the horrendous runoff of medical waste, smelly water, and all manner of trash from Waimanalo Gulch in January. The plumbing system that was supposed to drain water from slopes above the city's municipal waste landfill to the ocean was stopped up. The cascades of rainwater found another way to the sea: over the open face of cell E6, ripping off a veneer of soil cover and giving new meaning to the term "waste stream."

In our cover story and sidebars, Teresa Dawson manages to explore not only the events surrounding the devastating spill, but also the regulatory morass that must be credited with a starring role.

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Intense Storm Made Waste Spill Unavoidable, Waimanalo Gulch Manager Tells Commission

Was it avoidable? Or was it inevitable that a series of storms would wreak havoc on the Waimanalo Gulch Sanitary Landfill's storm water drainage system, break open a waste cell, and wash medical and municipal waste and contaminated runoff into the sea?

At a state Land Use Commission hearing held last month on the January flooding at O'ahu's only municipal solid waste landfill, Joseph Whelan, general manager for landfill operator Waste Management Hawai'i, Inc., claimed it was inevitable.

Whelan has argued that the rains of January 12 and 13 were equivalent to a 100-year storm and overwhelmed the landfill's drainage system, designed to handle only a 25-year storm. Had the rains come just two months later, when construction of a larger drainage channel intended to accommodate a larger storm was anticipated to be completed, storm water would have never come in contact with waste, he said.

At the February 2 hearing, LUC members tried to determine what could have been done to prevent the spill, starting from the time the design for that new system was completed up to the weeks preceding the spill.

By the end of the meeting, it was clear the commissioners did not like what they heard, which, based on a review of state Department of Health records, wasn't even close to the entire truth.

A Chronology

Whelan began his presentation to the commission by describing the new and improved drainage system Waste Management had been hard at work on when the rains came. A 14-to-16-foot-high berm would divert runoff from the upper part of the gulch to a culvert, which would be

connected to a 7-foot-wide fiberglass pipe that empties into an existing concrete channel. The channel leads to a reservoir at the bottom of the landfill, which in turn drains to the sea near Ko Olina resort. Construction began in November 2009.

"This is an approximately \$15 million project, not something that lends itself to being done in a short time," Whelan explained.

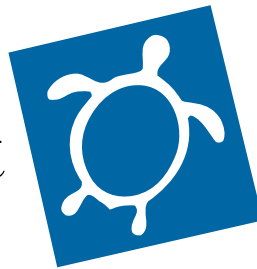
But over the time span of less than a month last winter, the landfill was beset by three storms, the first occurring on December 19. Whelan said that according to a rain gauge at nearby Lualualei, about 7.9 inches of rain hit the landfill in some 13 hours. Storm water flowed into a new waste cell known as E6. Because water had ponded in the cell, Waste Management created a berm to prevent it from breaching and brought in additional pumps to get rid of the water.

On December 27, another major storm hit, dumping four inches of rain in four hours, Whelan said. The cell filled again with water, and again crews scurried to reinforce everything they had built after the first storm.

The last storm came in the evening of January 12 and continued the next day. Whelan said the site received 10.7 inches of rain in a 24-hour period, 6.5 inches of it in about six hours. The discharges from the landfill's waste cell probably occurred in the middle of the night, but his company only realized some time in the afternoon that waste was leaving the landfill, Whelan said, even though his workers were on site as early as 5 a.m. that morning.

Whelan told the commission that once his company realized the magnitude of what had happened, it held a teleconference with city and DOH officials and began

Environment



Hawai'i

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NEW AND NOTEWORTHY

NELHA News, Part I: Ronald Baird, administrator since 2005 of the state's Natural Energy Laboratory of Hawai'i Authority, has announced he will be leaving. On December 31, Baird sent a letter out to some NELHA board members and tenants stating that he would be stepping down but would continue serving "at the board's pleasure" and would work with the Legislature this session on bills affecting NELHA.

In recent months, Baird has come under increasing fire from some board members over his administration of NELHA, which, despite its name, has become a center of aquaculture and desalinated water bottling facilities, with little in the way of ongoing energy research.

On Tuesday, January 11, Baird cancelled a meeting that had been scheduled for a week later. NELHA board chairman John DeLong

agreed, saying in an email to another board member that the only agenda item was "to establish the ED [executive director] search committee and this can be done without a meeting." The establishment of such a committee outside of an open meeting, however, would violate the state's Sunshine Law. DeLong's suggestion prompted deputy attorney general Bryan Yee, assigned to advise NELHA, to issue a memo to the board members, reminding them of the open-session requirements.

When the meeting was rescheduled, on February 16, the formation of a board search committee for Baird's successor was the chief item on the agenda, along with "discussion and possible action regarding the Executive Director and the Executive Director's... resignation letter." After a committee was formed in open session, the "possible action" on Baird was considered in executive session.

NELHA News, Part II: During the NELHA board's discussions on February 16, administrator Ron Baird described some of the bills introduced in the 2011 Legislature that could have an impact on NELHA. Most of them were introduced by Rep. Cindy Evans, whose district includes NELHA.

The most drastic bills call for reconfiguring the NELHA board and its Research Advisory Committee (excluding representation from the

Department of Land and Natural Resources and the University of Hawai'i at Manoa) and giving NELHA ownership of the land it occupies (now vested in the DLNR).

Russell Tsuji, representing the DLNR, and Don Thomas, representing UH, have been two of the most troublesome board members, from Baird's perspective. Still, Baird emphatically denied having anything to do with the drafting of the bills. When asked if Evans prepared them independent of any NELHA involvement, Baird replied, "until we read the bills, we didn't know" what was in them.

However, in an email to DeLong on January 12, Baird, referring to Tsuji, wrote, "For the sake of the organization it would be absolutely best that he [Tsuji] not be representing DLNR at NELHA, he has created enough damage. You and I need to meet with the new Chair of Land and discuss the matter as quickly as we can."

None of Evans' bills made it to crossover. However, a companion Senate bill (1390) to restructure the NELHA board was still alive at press time.

NELHA News, Part III: One of the ongoing sources of friction at NELHA has been the lack of an operational master plan to guide development and siting of new facilities. In 2007, however, Baird signed a contract with Group 70, the Honolulu planning firm, calling for it to prepare a master plan (including strategic plan, infrastructure and financial analyses, drainage systems, traffic plans, and design guidelines) for \$250,974. The notice to proceed was signed on December 3 of that year, with work to be completed by December 2, 2008.

Now, more than two years after the completion date, there's still no master plan. George Atta of Group 70 said that the document has been subject to "multiple edits," and while it has been "adopted in concept," his company has yet to receive any payment on the contract.

The contract requires any time extension to be specified by written notice. When *Environment Hawai'i* inquired, however, NELHA personnel could find no such notice.

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Quote of the Month

*"This is fertile land.
We need to keep land available
for the MA'O kids."*

— **Candace Fujikane**

Drama Continues Over Industrial Use Of Agricultural Land in Lualualei Valley

Developers of a proposed light industrial park in Lualualei Valley want more time to secure adequate access to the site, since one government official after another has told them that the project will not likely receive the approvals it needs without that.

During hearings over the past several months on whether to redistrict the relatively isolated 96-acre site from Agriculture to Urban, some members of the state Land Use Commission warned representatives of Tropic Land, LLC, that if the company could not secure a long-term agreement with the U.S. Navy to use its Lualualei Valley access road by the close of the hearing, it was unlikely they would support the project.

The state Office of Planning has also conditioned its support of the project on the company acquiring long-term access along the road, among other things.

As a number of testifiers made clear during the hearings, nearby Hakimo Road, a city road that winds through agricultural and residential lots, is not a suitable access to the site, which is likely to include a base yard for large trucks in the area.

The company's own traffic assessment concluded that the project would add hundreds of cars an hour to Farrington Highway, where traffic has already been classified as unacceptable by state Department of Transportation standards. Even with mitigation, the traffic situation would still be unacceptable, the assessment found.



Opponents of the Nanakuli Community Baseyard protest the project with homemade signs.

University of Hawai'i professor Panos Prevedouros, testifying last month before the LUC as a traffic expert, said that because Farrington Highway cannot handle any more cars, the commission should not consider a land use change.

When asked by Bryan Yee, the deputy attorney general representing the OP, what part of his expertise and training he used to come to that conclusion, Prevedouros said, "The part that is common sense."

Although access along Lualualei Naval Access Road would do little to alleviate traffic on Farrington Highway generated by the industrial park, it would reduce the likelihood that the additional cars would clog Hakimo Road, which the OP has called "substandard."

The LUC has taken no official action regarding access, but Tropic Land's attorney took the concerns expressed during the hearings by commissioners Normand Lezy

"What do you think the odds are of getting a loan without access?"

— Charles Jencks, LUC

and Charles Jencks seriously.

By the time the evidentiary portion of the hearing closed last month, Tropic Land had not secured a long-term access from the Navy. Project manager Arick Yanagihara told the commission that the company had accepted the Navy's offer of a five-year license for now and is negotiating something longer in the meantime. Yanagihara says his company has asked for at least a 30-year easement, a term that the OP seems agreeable to.

At last month's hearing, Jencks told Yanagihara, "You're a banker. ... What do you think the odds are of getting a loan without access?"

According to correspondence provided to the commission, negotiations between Tropic Land and the Navy had been going on for more than a year and a half. Lezy told Yanagihara that he was puzzled why the company had not made more progress.

On February 2, the LUC directed parties to the redistricting case, including the Office of Planning, the City and County of Honolulu, and the Concerned Elders of Wai'anae, to file their recommendations to the commission by February 24. The commission would have likely decided on the

petition some time after April, but on February 15, Tropic Land attorney William Yuen filed a motion with the LUC to extend for 90 days the time for filing recommended findings of fact and conclusions of law and to reopen the hearing. The LUC was scheduled to decide on his request late last month.

In his motion, Yuen stated that Tropic Land seeks until June 17 to introduce into evidence a written agreement with the Navy for a long-term easement to use Lualualei Naval Road for access from Farrington Highway.

Yuen wrote that he was in negotiations with the Navy and anticipated that Tropic Land would reach an agreement with the Navy by June 17.

Meanwhile, at the other commission ...

A day after Yuen filed his request with the LUC, the City and County of Honolulu's Planning Commission held a hearing on revisions to the Wai'anae Sustainable Communities Plan, which includes the spot zoning of the industrial park site.

Community members—in almost equal numbers of supporters and opponents of the project—filled the meeting room at

Kapolei Hale City Hall on February 16.

A handful of supporters wore matching T-shirts announcing their love of Nanakuli, while an almost equal amount of young adults, some of them interns at MA'O organic farms, wore "No panic, go organic" T-shirts and held signs that read "Malama 'Aina, protect ag lands," "Grow food, not concrete," and "Stop the [purple] spot," referring to the color used in maps to identify urban zoning in the proposed plan revision.

A day before the meeting, Alice Greenwood of the Concerned Elders of Wai'anae and Marti Townsend of KAHEA: the Hawaiian-Environmental Alliance, wrote the commission requesting that member Kerry Komatsubara recuse himself from voting on the plan, since he helped prepare Tropic Land's redistricting petition to the LUC.

Komatsubara did not attend the meeting the next day and before testimony got underway, commissioner John Kaopua also recused himself. Kaopua is a member of the Nanakuli-Ma'ili Neighborhood Board, which voted the night before to support the Tropic Land project.

Most of the testimony against the plan came from people wanting to preserve the



Wai'anae resident Zoe Jarvis (left) testified that roads can't support the kind of traffic the proposed baseyard would generate.

agricultural land in the valley. Candace Fujikane, a University of Hawai'i English professor, presented a map to the commission showing all of the pig and chicken farms in Lualualei Valley, one of them as close as 70 feet to the proposed industrial park site. She described how the urbanization of Kalama Valley years ago pushed pig farmers to Wai'anae and suggested that the park would displace them even further. She added that before the land was bought for golf course development in the late 1980s, it had been farmed.

"That is fertile land. We need to keep land available for the MA'O kids," she said.

A number of testifiers, including retired Wai'anae physician Fred Dodge, argued that the city administration should not have included the industrial park in the proposed revisions, since most of the community appeared to have opposed it at a hearing on the plan held by city consultants last November.

"We're essentially debating the future of what the community will look like," Cynthia Rezendes told the commission. She noted that while much of the community has consistently expressed a desire that

Wai'anae remain "country," she asked, "How do you define that? How do you include jobs that are not agrarian?"

She argued that the plan needed to go back to the community to allow for more discussion of the proposed industrial park (formally known as the Nanakuli Community Baseyard) and to give the time to LUC to decide whether or not to redistrict the land.

Rezendes and MA'O farms managing director Gary Maunakea-Forth suggested that the revised plan was already out of date, given the movement in recent years toward food security.

"If you pass this, it's missing an opportunity to plan for agriculture for not only this area, but for the whole state," Maunakea-Forth said.

Patty Teruya, chair of the Nanakuli-Ma'ili Neighborhood Board, countered that keeping the country country has only resulted in things like unemployment and trash dumping in her community. She added that most of the people opposing the baseyard are from outside Nanakuli, where the project is sited.

Nanakuli has been too rural for too long, she suggested. "Country country" did not bring jobs or economic development," she said.

Amber Demarco, a 20-year-old Wai'anae resident, also supported the project, saying she left the mainland to come home, only to find a job that forced her to leave her house at 4 a.m. and return at 11 at night.

"I need jobs," she said. "Change is coming. It's gonna happen. I have nothing against farmers [but] I'm into marketing. I'm into freelancing."

At times during the hearing, tensions between the two sides flared with park opponents booing supporters of more development and supporters grumbling when opponents spoke against the construction

industry. Others heckled the commission's chair when he cut off testifiers who passed their three-minute time limit.

Even with Rodney Higa's strict enforcement of the limit, there just wasn't enough time for everyone to be heard. Just before 6 p.m., with some 20 people still waiting to testify, the commission decided to continue the hearing at a later date.

If and when the commission accepts the plan, it will then be forwarded to the City Council for final approval.

It's all about jobs

Project proponents have all said it will provide the Wai'anae community with much-needed job opportunities, but whether or not the industrial park will actually provide those jobs is impossible to know.

KAHEA's Townsend (who also is the attorney representing Concerned Elders before the LUC) has suggested that given the current character of Wai'anae, local businesses aren't likely to flock to the park. Even if it's approved, the park will be empty, she argued to the Planning Commission.

Tropic Land's Yuen told *Environment Hawai'i* that some businesses have expressed interest in buying some of the three dozen or so lots proposed, but because the land will be divided under a condominium regime, "state law expressly says you can't sell lots in a condo until you register the condominium. We're not there yet and that precludes us from offering lots to anybody."

At least one supporter who attended the LUC meeting said she believes that the industrial park may include land for a farm incubator, but Yuen said that he was not aware of any organization that had expressed an interest to use the land for that purpose.

"The intent is to sell industrial lots. That's the kind of zoning we're trying to do. If it's going to be for industrial lots, I don't think farming is going to be a permitted use in that area. Our view is that there are a lot of other lands available for farming," he said.

Yuen said he was not sure what the lots will sell for, but was sure it would not be for \$30 million, as one opponent had suggested at the Planning Commission meeting.

Yuen clarified that \$30 million is what it will take to develop the entire project, not one lot. "To throw that out is misleading," he said.

(For more on this issue, read last month's cover story, "State, City Commissions Face Tough Decisions on Proposed Industrial Park in Lualualei Valley." All articles published in *Environment Hawai'i* are available on our website: www.environment-hawaii.org.)

— T.D.



Nanakuli-Ma'ili Neighborhood Board chair Patty Teruya testifies in support of the proposed industrial park.

Energy Projects Dominate Discussion Before Agribusiness Development Board

This month, the state Agribusiness Development Corporation (ADC) is expected to vote on whether to issue a 35-year license to Green Energy, LLC, a Kaua'i company that plans to grow trees on state land in Kalepa, then chip and burn them to create electricity. The project, which includes private land as well, could potentially provide 11 percent of the island's electricity.

Right now, the state lands are still managed by the Department of Land and Natural Resources, and Green Energy has a revocable permit to harvest trees from more than 1,000 acres. The DLNR is in the process of transferring those lands to the ADC.

Last month, company president Eric Knutzen updated the ADC board on the project's status. He reported that Green Energy had signed a power purchase agreement with the Kaua'i Island Utility Cooperative (KIUC) in January. A long-term license from the ADC would need to be approved as soon as possible to secure adequate financing, which he expects to acquire by August.

If the state Public Utilities Commission approves the project, construction should start this November and commercial operation should begin two years later.

"There's a lot of expectations here," Knutzen said of his project. If it and other renewable projects that have been proposed don't succeed, KIUC may need to build a fossil fuel plant, he said.



Power Developers Compete For Water, Land in West Kaua'i

While the Green Energy project is likely to get the green light from the ADC, complications abound for the renewable energy projects proposed by Kaua'i-based Pacific Light and Power for lands in Kekaha.

Last September, the ADC gave the company preliminary support for its proposal to lease about 1,800 acres of land controlled by the agency to create a variety of renewable energy projects that would primarily benefit area farmers. But a competing proposal by Pacific West Energy, LLC, sought to use the same amount of land to grow biomass to generate electricity for the Kaua'i Island Utility Cooperative. That proposal has since found support from at least one ADC board

member, chair Christine Daleiden.

After losing out to PLP in September, Pac West managed to garner support from Kaua'i County Council member JoAnn Yukimura and the International Longshore and Warehouse Union, and eventually persuaded the ADC to reconsider its decision.

In December, the ADC established an investigative committee to look more closely into the land and water needs of PLP's project, which would help determine if there was any room for Pac West.

Based on the committee's report to the board last month, things don't look good for Pac West, registered in Delaware.

Kekaha Committee chair David Rietow, who was on the investigative committee, explained that PLP will need all 1,800 acres — which is about all available land in the ADC's mauka section — to grow biomass for its gasification plants and to construct its hydropower facilities.

ADC executive director Alfredo Lee said that some land for Pac West could become available if existing tenants are willing to give up some of their land.

Rietow noted that PLP's project would improve the area's irrigation system and generate electricity for tenants. He said it was "farm-oriented, not energy-oriented," in that it focused on the needs of the Kekaha Agriculture Association.

Lee noted that PLP needed to sign a license by mid-April, which meant that the board needed to decide soon whether to devote any more time to Pac West's proposal.

Daleiden said that, to determine PLP's lease terms, the board needs to decide if it wants to allow other energy tenants on its lands.

"How can we divide up the lands? Can we have both parties submit a compromise position?" she asked.

Lee responded that both parties have indicated they want all of the available land for themselves. If the board moves forward with a license to PLP, it needs to include a lot of special conditions, he added.

"My concern is that we give them a 20-year license and they don't do anything," he said.

Hydropower

As if one competitor weren't enough, PLP is facing competition for the water it needs for its proposed hydropower plants along the Koke'e Ditch.

As part of its overall plan for the ADC's Kekaha lands, PLP has proposed to develop three hydroelectric facilities along the Koke'e and Kekaha irrigation ditches to produce a total of 11 megawatts. Two of those will be on the Koke'e Ditch.

But last October, the Massachusetts-based Free Flow Power Corporation filed an application with the Federal Energy Regulatory Commission that also proposes to develop hydropower on the Koke'e Ditch. And in January, the KIUC announced that it had signed a memorandum of agreement with the company to explore the development of four hydroelectric projects across the island, including the one at Koke'e.

PLP, the ADC, the County of Kaua'i, and the Kekaha Agriculture Association, which manages most of the infrastructure of the Kekaha lands for the ADC, have all filed motions to intervene.

PLP has filed for an exemption from regulation by FERC because its project will not discharge into navigable waters, but into an irrigation ditch.

PLP's chief development officer, Palo Luckett, says that for any hydropower facility to succeed using the Koke'e ditch, "all parties would need to be on board," noting that the ADC has the rights over the land and water in the ditch and the KAA controls the flow of water.

For PLP, the hydro facilities are key to their overall plan to improve both the agricultural and electrical infrastructure on the ADC's Kekaha lands while generating electricity. Revenue from the hydro plants will pay for eight miles of irrigation pipes that would conserve water, improve water quality, and reduce the need to maintain ditches.

Luckett says the project will cost about \$40 million to construct. — T.D.



For Further Reading

The following related articles are available at our website, www.environment-hawaii.org:

- ◆ "Board Defers on Plan to Grow Albizia for Fuel," BOARD TALK, January 2008;
- ◆ "Farmers Make Room for Green Energy," BOARD TALK, August 2008;
- ◆ "Agribusiness Subcommittee Approves Renewable Energy Project at Kekaha," October 2010;
- ◆ "Agribusiness Committee May Reconsider Rejected Biofuels Project at Kekaha," January 2011.

Managers Dispute State Assessment Of Storm Water Discharges from Landfill

Did the storm water that accumulated at the Waimanalo Gulch Sanitary Landfill last December and January come into contact with solid waste, thus requiring it to be treated as leachate? This question is at the heart of a dispute between state health officials and managers of the landfill, O'ahu's only repository for municipal solid waste.

Most of the recent controversy over events at the landfill stems from the inundation of Leeward beaches with vials of blood, hypodermic needles and other medical waste, as well as unknown amounts of municipal waste that had been deposited in a landfill cell that overflowed with storm water on January 13.

In the quest to determine whether the disaster could have been avoided, a Department of Health investigation into the discharge of potentially contaminated water late last year has also become a hot topic, since it suggests that Waste Management Hawai'i, Inc., which has operated the landfill for the City and County of Honolulu since it opened more than 20 years ago, was having major

"The downstream area of the cell appeared significantly polluted with a mixture of solid waste and storm water." — state Clean Water Branch

problems managing its storm water well before the breach in January.

When or whether the DOH will issue a violation warning or notice to Waste Management and the City and County of Honolulu, which owns the site, is unknown. But recent statements by Waste Management general manager Joseph Whelan and city Department of Environmental Services director Timothy Steinberger make it clear that that they see nothing wrong with their having pumped storm water last December from a landfill cell into a channel that empties into the sea.

What's more, in the hours preceding the January disaster, Steinberger actually argued against Health Department efforts to get the city to post warning signs in the event of an especially heavy rain.

Should the DOH find that unauthorized discharges occurred, Waste Management could face fines of up to \$25,000 per violation per day. Violating terms of the landfill's solid waste permit could add another \$10,000 per day.

Deluged

December 2010 was an unusually wet month for O'ahu. Rains began overwhelming the landfill's water management systems as early as the 10th. That day, a Friday, the landfill received about two inches of rain in a short period of time, raising the leachate level in one of its sumps above the maximum permitted level set by the state, according to a DOH incident report. It took three days of pumping, with the addition of a second pump on Monday, to bring the leachate level back down into compliance.

On December 18, the last day the landfill accepted waste until it began accepting limited amounts on January 28, landfill workers covered the day's trash with a foot of soil. It rained hard the next day and on December 20, Waste Management contacted the DOH's Solid and Hazardous Waste Branch, giving notice that it would be "draining storm flows ... into the storm water drain systems." This, Steinberger contended later, in a January 13 letter to the DOH, was in accord with established practice whenever flows were "as heavy as a 24-hour, 25-

year storm."

Clean Water Branch (CWB) inspectors visited the landfill on December 21. They were told of the measures Waste Management was taking to dispose of the accumulated storm water and left "without indicating to WMH that they had any concerns regarding WMH's actions," Steinberger wrote.

But when inspectors from the Solid and Hazardous Waste Branch (SHWB) visited the site two days later, they noticed something disturbing. The storm water being discharged into the drainage system appeared to have been in contact with municipal solid waste. Steinberger, in his January 13 letter, suggested that the inspectors' concerns were minimized because "the entire island was under a brown water advisory." Yet the SHWB team was concerned enough to alert the CWB and investigators from that branch responded immediately. They found that the rain had caused a three-foot-wide drainage pipe running under a new solid waste cell, E6, to become clogged with silt and debris. The drainage pipe was intended to receive storm waters from upslope

of E6, but with the pipe blocked, runoff flowed over diversions and into the cell itself.

Waste Management environmental protection manager Justin Lottig informed CWB inspectors that between the afternoon of December 19 and December 23, the landfill had intermittently pumped storm water from cell E6 into the drainage system, which empties into the ocean at the Ko Olina resort. He estimated that at one point, storm water in the cell was 38 feet deep.

"J. Lottig stated that the storm water that normally collects in the E6 cell flows through the cell into the leachate collection system where it would be collected and transported to the Wai'anae Wastewater Treatment Plant for treatment as industrial wastewater," a December 23 CWB investigation report states. The report also notes that Lottig said the pumped storm water "may have contacted solid waste."

Inspectors Matthew Kurano and Jamie Tanimoto, however, were sure of what they saw. They wrote in their report that it appeared that standing water in the cell may have penetrated the leachate collection system while exposing solid waste. They also saw significant amounts of exposed waste in one part of the cell.

"The downstream area of the cell appeared significantly polluted with a mixture of solid waste and storm water. ... The storm water observed within the E6 cell was clearly in contact with and passed through solid waste. As such, the liquid observed within the E6 cell was landfill leachate," they wrote.

Next Steps

In their report, the CWB inspectors wrote that the company had violated state law by failing to get DOH permission to pump water from cell E6 — water they characterized as leachate, and not storm water — into the storm water drainage system. They added that enforcement actions might be necessary and that the branch would be pursuing a notice of apparent violation and request for information.

After their inspection, the investigators asked Waste Management to sample the storm water and stop pumping it into the storm drain system. That same afternoon, the CWB's acting chief, Joanna Seto, instructed the city to issue a press release stating that there had been a release of storm water that was potentially contaminated with leachate into the Ko Olina coastal area.

Because Seto did not explain why she thought the storm water might have been contaminated, Steinberger wrote in his letter, his department refused, arguing that storm water is not leachate under the law and that draining flows was an established practice with which the DOH was familiar.

The DOH instead issued its own press release on the evening of December 23, announcing that it was investigating the discharge of potentially contaminated storm water from Waimanalo Gulch into the ocean. In a *Honolulu Star-Advertiser* report that followed, city representatives contradicted what Lottig had reportedly told the CWB and what inspectors saw, stating, "At no time was the storm water mixed with any solid waste."

Also, Steinberger pointed out in his letter to the DOH, test results of the storm water showed that it met state and federal standards for storm water run off, "except for naturally-occurring background concentrations of iron and zinc, which are typically found in storm water discharges throughout O'ahu."

Even so, according to letters from Ko Olina vice president of resort operations Ken Williams, and Bob Teramoto, president of The Coconut Plantation condos at Ko Olina, the storm water coming from the landfill was worse than normal.

"Our residents have reported increased water flow and odor smelling like a dump," Teramoto wrote in a January 28 letter to Whelan. Teramoto expressed his association's concern that Waste Management's expansion activities at the landfill had altered the drainage.

"Is it possible for the leach from the landfill to contaminate the rain runoff causing the smell? ... This is an important situation that needs to be addressed. It will benefit the community at large by assisting in maintaining the landfill and addressing the drainage issues," he wrote.

In testimony last month before the state Land Use Commission, which oversees the special use permit that allows the landfill to operate in the Agriculture District, Whelan disputed any assertion that the water that was pumped into the drainage system was leachate. No water from within the cell was pumped into the ocean, only water on top of the cell, he said.

When pressed by attorneys representing the Ko Olina Community Association and U.S. Representative Colleen Hanabusa about the observations detailed in the December 23 CWB report, Whelan would not deny or admit to anything since an investigation was ongoing. He did say he believed leachate in the cell had no contact with storm water.

According to Markus Owens, public information officer for the city's Department of Environmental Services, the landfill's storm water management plan prohibits water from ponding on top of waste cells and the city's solid waste permit allows water to be pumped off.

He argues that CWB inspectors have no

idea what the makeup of the storm water was and contends it was separated from waste in the cell by about a foot of soil.

"The problem was, they saw a couple of bags and stuff floating on the water, which could have been fugitive bags and not necessarily waste that had been uncovered," he says.

When asked whether that mattered, Owens says, "Absolutely. If you drive a car on the road, you drop a paper bag in a puddle, that's leachate? ... If so, we've got leachate going out every storm drain on the island," he says, adding that the CWB is trying to redefine leachate.

Splitting Hairs

About two weeks after the state launched an investigation into the allegedly unauthorized pumping, weather forecasts indicated that rain might threaten cell E6 again. This time, on January 11, the Health Department, the city and Waste Management agreed to send any accumulated storm water to the city's Wai'anae and Kailua wastewater treatment plants "so as to facilitate the incremental reopening of the impacted E6 cell," Steinberger wrote.

On January 12, with O'ahu under a flood advisory, Mike Tsuji of the CWB asked the city and Waste Management to post contaminated water warning signs if an event similar to the December 19 storm occurred.

To Steinberger, the request seemed unreasonable. He argued that storm water from the December 19 event had not "percolated or passed through or emerged from solid waste," and was therefore not leachate under Hawai'i Administrative Rules.

In his letter, Steinberger acknowledged a condition in the city's solid waste permit that would seem to require the city to treat the storm water as leachate, but he did not give it any weight. (This despite the fact that even the landfill's surface water management plan states that the drainage system should prevent "run-off of surface water that has contacted waste.")

The condition states: "Storm water that comes in contact with solid waste shall be managed and disposed of as leachate." The condition has been included in the DOH permits for Waimanalo Gulch since at least 2003. A strict reading of the condition would mean that if any storm water so much as touches solid waste, it can't be discharged into the sea under the landfill's National Pollutant Discharge Elimination System Permit. Instead, it must be trucked to a wastewater treatment plant for disposal.

In the eyes of the CWB, it also means that any discharge of that water should be treated similar to a sewer spill. And on January 13, given the predicted rainfall, the branch de-

manded that the city and WMH post signs warning the public about contaminated water discharges. By this time, the storm had already washed waste from cell E6 offsite. Apparently unaware of the extent of the situation when he wrote the letter, Steinberger stated that the city disagreed with the CWB's conclusion that the storm water should be treated as wastewater.

Under Health Department rules, when there is a spill from a wastewater system, signs must be posted in areas likely to be affected and where public access is possible.

"We are assuming that this is the purported legal basis for CWB's directive ... However, this is not applicable to the present circumstances because [Waimanalo Gulch] is **not** a 'wastewater system' as defined by HAR section 11-62-03," he wrote.

In his January 13 letter to DOH deputy director Gary Gill, SHWB chief Steven Chang, and the CWB's Seto, Steinberger did not dispute that storm water touched solid waste (although he did not admit it, either).

"SHWB asserted, first, that accumulated storm water is leachate that may not be pumped into the storm drain system but must be disposed of at the treatment plants. Then, today, CWB asserts even more broadly that WGS's storm water runoff requires the posting of warning signs as if it were wastewater. These conclusions are not supported by the facts of the law, and are contrary to the measures that ENV [the city's Environmental Services Department] and WMH have taken over the years, at DOH's direction and/or with DOH's approval," he wrote.

Waste Management representative Keith DeMello adds in an email to *Environment Hawai'i* that, on January 13, millions of gallons of storm water "scoured some waste, which appears to have been limited to plastics and other floatable material. It is misleading to characterize the discharge as 'leachate,' which is the liquid that is secreted from municipal solid waste." He also states that water sampling over the last two months has only produced results typical of storm water.

In the end, given the magnitude of the spill, signs were eventually posted. At the February LUC hearing, Whelan testified that after discussing the matter with the Health Department on the afternoon of January 13, a "collective decision" was made to post warning signs.

When asked by Ko Olina attorney Ben Matsubara whether the city would be investigating any possible violations at the site, Steinberger said that his department was deferring to the DOH and that since no notice of violation has been issued, he considered the facility to be in compliance with all government regulations. — **T.D.**

Waimanalo Gulch from page 1

sampling runoff and posting warning signs at the drainage outlet, and later along the beach fronting the Ko Olina resort.

A Grilling

In September 2009, the LUC, in a 5-3 vote, barely approved an extension of Waimanalo Gulch's special use permit, which allowed the landfill to expand by more than 90 acres. The surrounding community, which opposed the extension, had had enough of a landfill that was supposed to have closed years ago. But, in the end, there just didn't seem to be any other option.

"The very fears that the community raised before this commission were realized by this spill and then it comes back to us ... because we passed it," LUC chair Vladimir Devens told Whelan.

When it came time for commissioners to question Whelan, Devens was aggressive from the start. He wanted to know what warning, if any, was given to the community and to residents of Ko Olina to alert them that syringes and blood components might be floating in the ocean.

Whelan responded only by saying that a collective decision was made to post warning signs at the storm water outfall.

"We assembled those signs at the city, and put those up at 4 or 5 in the afternoon. We didn't realize medical waste was an issue until about that time. Once we realized there was, we had already put up warning signs," he said.

Commissioner Normand Lezy, one of the commissioners who opposed the extension, asked Whelan what evaluation, if any, Waste Management did after the December 27 storm to assess the possibility that the reinforcements could fail and allow waste to leave the cell.

"It sounds like, in each instance, you were kind of dodging a bullet. The first time it flooded, fortunately there was no discharge. The second time it flooded, there had been some sort of work done to build a berm and strengthen the cell to avoid a discharge. You then get to the third event, more rain, more water, and there is an actual discharge. So what I'm wondering is, what sort of evaluation was done to quantify what the risk was that there would be a discharge if more rain and more water ended up in the cell?" Lezy asked.

Whelan said that his company had no advance notice that such a huge storm was coming and that the landfill is only required to handle a 25-year, 24-hour storm. (According to the company's surface water management plan, however, the landfill

Health Department Slashes Fine For Violations at Waimanalo Gulch

It's no secret that the state Department of Health usually settles fines for far lower than the amount originally proposed. The recently concluded violation case regarding O'ahu's Waimanalo Gulch Sanitary Landfill is no exception.

Last May, the DOH fined the City and County of Honolulu and landfill operator Waste Management Hawai'i, Inc., \$424,000 for several violations of their solid waste permit. The Notice of Violation and Decision and Order addressed the company's failure to construct portions of the landfill in accordance with approved designs and to report those failures to the department in a timely manner.

In fact, the company submitted the required report only after the department threatened to withhold renewal of its solid waste permit.

Waste Management, joined by the city, quickly requested a contested case hearing, and according to company general manager Joseph Whelan, a hearing had been tentatively scheduled for some time last November.

By early December, the parties had reached a compromise. In a seven-page settlement agreement signed on December 3, WMH consented to pay a penalty of \$100,000 within 20 days and face fines of \$1,000 a day for each day the fine went

unpaid after the deadline.

Signed by then-department head Chiyome Fukino and WMH vice president Robert Longo, the agreement states, "[T]he DOH finds that this settlement is in the public interest."

The department's file on the case, when inspected by *Environment Hawai'i* last month, included no proof of payment, but according to the Solid and Hazardous Waste Branch, it received payment from Waste Management on December 17.

What arguments Waste Management made to persuade the department to shrink its proposed fine by more than 75 percent is a mystery, since the case file provided to *Environment Hawai'i* contained only a copy of the notice of violation, the settlement agreement and two newspaper clippings about the violations. The file did not even include the May 25 letters from Waste Management's attorneys and city counsel requesting a contested case hearing.

This is not the first time the department and Waste Management have settled for a greatly reduced fine. In January 2006, the DOH fined Waste Management \$2.8 million for 18 violations of its solid waste permit, but ended up settling for \$1.5 million in a settlement agreement reached in December 2007. — T.D.

should be able to handle 9.1 inches of rain within 24 hours, which appears to be more than what fell during the first two storms.)

He added that after the storm water drain pipe clogged with silt during the first storm, his company evaluated why that had happened and built a berm up above it to try to stop debris from clogging it again. It also used boulders to divert and slow runoff and built a small dam behind the berm.

"All of that failed because of the magnitude of that storm," he said.

Lezy asked, "Do I understand you to say that, at least in your company's estimation, that this event was unavoidable?"

"Yes," Whelan said.

Lezy asked whether, as part of the planning for the new diversion system, any particular cells were identified as being at risk for flooding.

Whelan said that the DOH solid waste

permit acknowledged that during construction of the diversion system, there could be a time when storm water could overflow into the cell.

Lezy then asked whether there was any reason why cell E6, which had only been in operation for a couple of months, didn't simply stop accepting waste while the long-term diversion project was being finished.

Whelan responded that E6 was the only area that had any capacity left.

To Devens, it was clear what had happened.

"What it sounds like to me is that you folks went ahead with this construction, you did not take any proper preventative measures, and just hoped it wasn't going to rain. And when it did, you folks were caught with your pants down. This is what happened. Isn't that really what happened in this case?" he told Whelan.

Devens continued, “[W]e have this massive discharge and there was just a lack of urgency in my mind with the public not knowing the extent of the discharge and what was actually contained in that discharge. I was shocked when I heard that there were needles on the beach at Ko Olina, in Nanakuli, down to Wai’anae. I was also shocked to see that people were picking that up with their bare hands and in slippers. And yet there were no warnings out there to the community warning them of those dangers.”

When Whelan pointed out that the improved drainage system was proposed more than ten years ago, but could only recently be constructed, Devens responded, “Over the last ten years, couldn’t you have figured out what the preventative measures were going to be while the construction was going on instead of leaving everything open like it was? ... I don’t buy that this was unavoidable. I hear what you’re saying but it doesn’t make any sense to me.”

Hindsight

A review of records from the state Department of Health’s Solid Waste Branch suggests that with regard to designing an effective drainage system, the city and Waste Management had backed themselves into a corner, quite literally. Although the DOH had expressed some concerns about the

design, it ultimately approved it with certain conditions.

First, as Whelan pointed out, the drainage improvement project was a massive undertaking — so massive that it defied the landfill’s standard solid waste permit condition that any work on surface water management features be completed before the rainy season.

Specifically, the permit requires Waste Management to report on an “annual inspection of surface water management features and facilities, together with a description of required maintenance and changes, which shall be completed by September 1 of each year.”

Even so, the permit also acknowledges the fact that during construction, there may be times when there are no means to convey storm water around the landfill or there is a storm so big that it overflows temporary drainage structures into cell E6.

The permit required Waste Management to cover pocket areas with a geomembrane sheet and to put in place pumps and other necessary equipment before such a rain occurred.

Before even constructing cell E6, Waste Management was supposed to have determined the quantity of sheeting and the size and number of pumps and other equipment deemed necessary, and to stage those materials for immediate use to prevent runoff from entering cells and eroding landfill cover.

Apart from the work on the drainage project lasting well into the rainy season, there was the fact that a 2003 expansion of the landfill left engineers with little room, and therefore, little choice but to eliminate drainage features that might have prevented overflows.

A storm water pond to control silt and debris from the upper part of the landfill was supposed to have been built after the DOH approved a solid waste permit in 2003 allowing for a 14.9-acre expansion. Years after the DOH had repeatedly asked Waste Management for a construction schedule for the pond, Waste Management informed the agency that it would not be built because it did not fit within the LUC’s special use permit boundary.

According to a 2009 report on what Waste Management describes as the Western Surface Water Drainage Project, the open drainage channel that diverted flows into the reservoir at the bottom of the landfill was fitted with about 5,200 feet of pipe and backfilled to make room for an extension of the landfill’s West Stability Berm and temporary stockpiling operations. Not only did that berm re-

place an open flow channel with the pipe that clogged during last winter’s heavy rains, it also left no room for the storm water pond.

A November 2009 report on the drainage project by GEI Consultants, Inc., notes that using a pipe to convey runoff in steep sections “also enables use of smaller, more economical pipe sections.” It adds that constraints of the site “preclude the use of other conveyance system alignments or energy dissipators ... to reduce the overall grade and flow velocity.”

As to Whelan’s statement to the LUC that the project had been proposed a decade ago, that wasn’t quite true. Over the years, it seems the city and Waste Management could not keep designs for the project straight, submitting to the DOH one set of revisions after another. As late as 2008, drawings for the drainage system still included the pond that they claimed earlier could not be built within the permit boundary.

Complete drawings for the drainage project had not been submitted by September 2009, two months before construction began. On September 25, DOH Solid and Hazardous Waste Branch chief Steve Chang notified the city and Waste Management that their Western Drainage Project report was incomplete and the design submitted contained no provision for dissipating high velocity flow. On December 2, Chang again pointed out deficiencies in drawings that had been submitted. They did not include enough information on how the drain pipes would be supported and on how the different components downslope of cell E6 would be connected.

What’s more, the designs submitted conflicted with each other and didn’t make sense to Chang.

For example, he wrote, “The installation of such a large (7 feet high by 12 feet wide) trench with pipes under the base liner was unexpected, and raises concerns including but not limited to the ability of the temporary storm water drains to handle 25-year 24-hour storm flows. We assume that this portion of the storm water system will be in operation before the entire western drainage system is constructed.”

He added that the pipes being used “may not be adequate to handle peak storm flows without an overflow capability. Please include the headwall design and explanation of how overflows will be avoided during peak flows in the updated drawings.”

By the time the DOH approved a new solid waste permit for the landfill last June, it appeared to have received an acceptable design in January, two months after construction had already begun. — **Teresa Dawson**



For Further Reading

The following articles about Waimanalo Gulch and Health Department fines are available at www.environment-hawaii.org:

- ◆ “Challenges Shrink, Delay Payment of Large Health Department Fines,” and “Disappearing Act: The Incredible Shrinking Fines at the DOH,” February 2004;
- ◆ “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;
- ◆ “Hearing Begins on Honolulu’s Petition to Change Landfill’s District to Urban,” June 2009;
- ◆ “LUC Keeps Waimanalo Gulch Open for Municipal Waste Another 3 Years,” November 2009;
- ◆ “Waimanalo Gulch Operators Contest Fine Despite Leniency of Department of Health,” August 2010.

Food Irradiator Shifts Attention to Site At Kunia, But Won't Give Up on Airport

The food irradiator that Michael Kohn of Pa'ina Hawai'i has been planning for years is stalled out once more. Kohn, it will be recalled, obtained a license from the Nuclear Regulatory Commission to build a cobalt-60 food irradiator near the Honolulu airport back in 2005. The intervention of Concerned Citizens of Honolulu resulted in the determination that an environmental assessment would need to be done before the plant could be built.

The challenge to the EA is winding down, with the NRC having issued a draft supplement to it in December (the final was expected to be released around March 1). But Pa'ina has thrown another wrench into the gears; it is now seeking to put an irradiator on land owned by the Hawai'i Agricultural Research Center (HARC), site of the former Del Monte pineapple baseyard in Kunia, in Central O'ahu.

Pa'ina Hawai'i obtained a Conditional Use Permit – Major (CUP-M) from the City and County of Honolulu's Department of Planning and Permitting in early December, clearing the way for an irradiator on the site. With that in hand, on December 16, Pa'ina asked the NRC to amend its existing license by adding the Kunia property as a second location. The NRC replied on January 20, stating that the amendment request was incomplete, lacking “the supporting geotechnical and seismic analysis for the proposed additional location... As such, we are voiding your amendment request without prejudice” until the information is received.

Meanwhile, the Atomic Safety and Licensing Board, which has been overseeing the challenges to Pa'ina's license, saw Pa'ina's request to amend its license as an opportunity to settle the long, drawn-out legal contest over the airport site. On February 3, the ASLB issued a series of questions to Pa'ina, NRC staff, and Concerned Citizens.

The ASLB asked Pa'ina what kind of representations it made to the Honolulu DPP about the status of a license for the Kunia site. Pa'ina replied that it intended to “get the Kunia site licensed by the NRC” when the CUP-M was granted and that it had, in fact, sent an application letter on December 16.

But in response to the ASLB's question as to whether the Kunia location was now Pa'ina's “preferred site,” Pa'ina attorney Fred Benco said, “No, Pa'ina is equally interested in the airport site.” And as for Pa'ina being interested in “ending immediately the current proceed-

ing by joining a settlement in which Pa'ina would seek to amend” its license by replacing the airport site with Kunia, Benco wrote, “No. We have filed an amendment to add the Kunia site to the instant license for the airport site.”

Concerned Citizens, on the other hand, was willing to settle. David Henkin, attorney for the group, noted in his response to the ASLB questions that the draft supplement to the EA “indicates that, of the various alternate locations for a cobalt-60 irradiator, the Kunia site is by far the safest from harm due to natural disasters. Accordingly, if Pa'ina is intent on constructing and operating a cobalt-60 irradiator and is willing to forgo use of the airport site, Concerned Citizens would be open to discussing settlement of the current proceeding.”

Henkin also pointed out, however, that the draft supplement “confirms that the project's purpose and need could be accomplished without the transport or use of nuclear material, avoiding all potential risks to Hawai'i's resident's and environment from accidental radioactive releases. Concerned Citizens respectfully submits that, if Pa'ina wants to construct and operate a food irradiator, it can and should avoid these unnecessary threats to public welfare and use the non-nuclear, electron-beam technology in lieu of cobalt-60.”

On February 16, the ASLB ordered Pa'ina and the NRC staff to answer further questions. First, Pa'ina was given a chance to reconsider its rejection of the settlement option. (Its answer: No.) Second, the NRC staff was asked whether its rules authorized an irradiator license to be issued for multiple locations and, if so, how many multiple-site irradiator licenses had it issued. (NRC's answer: There's no definite regulatory authority or precedent, but this doesn't mean that multiple-site licenses were disallowed. And No, the NRC hadn't granted any “multi-site license for pool irradiators.” But until Pa'ina's request in December, no one had ever applied for one.)

An Important Precedent

The proposed food irradiator is not the most significant dispute to come before the NRC, which routinely deals with licenses for nuclear plants that are hotly contested by groups representing thousands, if not millions, of citizens. In fact, usually the licenses for such facilities are handed out (as this one was) without the preparation of any environmental

assessment or environmental impact statement.

But by challenging the NRC's decision to license this facility under a so-called categorical exemption, Concerned Citizens has put itself on the map – or, rather, on the list of authorities that are cited in the motions and briefs of many of the parties pleading their cases before the NRC or the ASLB. Plug “pa'ina” into the search engine on the NRC's online database of documents, and the results reveal just how frequently the decisions in this case have been cited in other dockets.

Henkin, the attorney whose arguments on behalf of Concerned Citizens have been so persuasive, demurs. “In the course of the proceeding,” he said in an email to *Environment Hawai'i*, “we've raised several issues of first impression and generally have been successful in compelling the staff to take more seriously its NEPA obligations.” (NEPA is the National Environmental Policy Act, which governs the disclosure of environmental impacts.)

“I don't have any basis, however, for commenting about the case's broader impact on NRC litigation,” he wrote.

— **Patricia Tummons**



For Further Reading

Articles published by *Environment Hawai'i* on the O'ahu irradiator include:

- ◆ “Honolulu Airport Is Proposed as Site for Cobalt-60 Food Irradiation Facility,” September 2005;
- ◆ “Group Requests NRC Hearing on Proposed Airport Irradiator,” November 2005;
- ◆ “Draft EA Is Released for Irradiator Proposed Near Honolulu Airport,” February 2007;
- ◆ “Irradiator Update,” *New & Noteworthy*, June 2007;
- ◆ “Whatever Happened to... The Food Irradiator at Honolulu Airport,” April 2008;
- ◆ “Irradiator Dispute Keeps Simmering,” *New & Noteworthy*, November 2008;
- ◆ “Environmental Assessment for Irradiator Is Ridiculed by Atomic Safety Board Judges,” October 2009;
- ◆ “Another Setback for Irradiator,” *New & Noteworthy*, August 2010;
- ◆ “An Irradiator in Kunia?” *New & Noteworthy*, November 2010.

BOARD TALK



Board Votes to Appoint Hearing Officer For Haleakala Telescope Contested Case

On February 11, the state Board of Land and Natural Resources decided to appoint a hearing officer for a contested case on the recently approved Conservation District Use Permit (CDUP) for the construction of a telescope on Haleakala's Pu'u Kolekole.

The \$300 million Advanced Technology Solar Telescope, to be built in the University of Hawai'i's "science city" area of the mountain, would impact cultural sites and view planes on the mountain, according to the project's environmental impact statement. And because of those cultural and environmental impacts, a group known as Kilakila 'O Haleakala requested a contested case hearing before the board voted to approve the permit at its December 1 meeting.

Laura Thielen, the board chair at the time, did not allow Kilakila 'O Haleakala's attorney, David Kimo Frankel, to present its case to the board that day.

Frankel, an attorney with the Native Hawaiian Legal Corporation, had argued that the board could not approve the permit without first deciding on the contested case hearing request. After receiving advice from the board's deputy attorney in executive session, Thielen informed Frankel that, although the board has followed that process in the past, the department's rules on contested case hearings do not require it.

At the board's February 11 meeting, Frankel argued, among other things, that the board should void the CDUP before starting the contested case hearing.

"If the board refuses to void the CDUP but nevertheless schedules a contested case hearing, the BLNR will be acting without any legal authority. What would be the subject of the contested case hearing? If the permit has already been granted, then there is no issue before the BLNR... The contested case hearing would be a mere formality, representing a post hoc rationalization of a decision already made," he wrote in testimony to the board.

Frankel pointed out that the board held contested case hearings before deciding on a proposed hydroelectric plant on Honoli'i Stream near Hilo, proposed power lines on O'ahu's Wa'ahila Ridge, and the proposed Keck telescope on Mauna Kea, among other things.

So that his clients would get as fair a hearing as possible, Frankel also requested

that Maui board member David Goode recuse himself from voting on the matter, since he had made pro-jobs statements during the board's December meeting. Frankel also

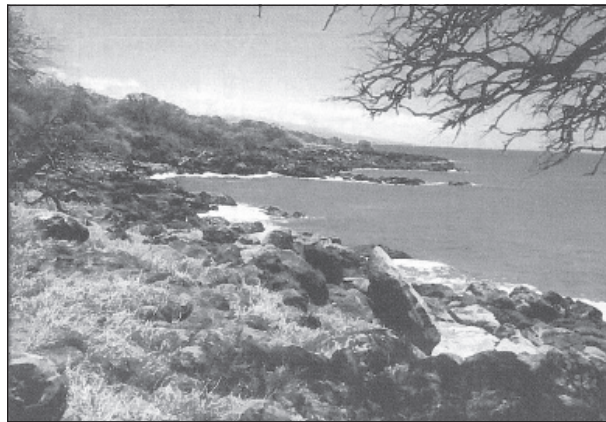


PHOTO: DLNR

A coastal view at Kaiholena.

asked that the hearing officer not be someone who represents clients seeking development approvals from the board.

Responding to Frankel's request that he recuse himself, Goode said, "I can't imagine why I would recuse myself. ... I think I'm free to speak about whatever I want."

O'ahu board member John Morgan indicated that based on advice the board received from its deputy attorney general, it would not be taking any action to void the permit.

"You can hammer on this all you want," he told Frankel, but the board had already gotten opinions twice from its counsel on what is required under contested case rules.

Legacy Program Protects Farms, Natural and Cultural Resources

Four new conservation projects, three of them brokered by the Trust for Public Land (TPL), will receive a total of \$4,450,000 under the state's Legacy Land Conservation Program, which is funded by a portion of state conveyance taxes.

On February 11, the Land Board unanimously approved a recommendation from its Division of Forestry and Wildlife to encumber funds for the following projects:

- ◆ \$1.65 million for the County of Hawai'i's acquisition of 76.55 acres at Kaiholena to protect open space, cultural and archaeological sites, and coastal resources. Total project cost: \$4,604,000;

- ◆ \$325,000 for the TPL and Livable Hawai'i Kai Hui to acquire five acres of the Hawea Heiau Complex and Keawawa wetland in Honolulu. Total project cost: \$666,250;

- ◆ \$975,000 for the TPL and Maika'i Kamakani 'O Kohala to acquire 27,546 acres at Kauhola Point in North Kohala to preserve cultural sites, recreational areas, and coastal lands. Total project cost: \$1,331,000; and

- ◆ \$1.5 million for the TPL and North Shore Community Land Trust to acquire 469 acres of Turtle Bay mauka lands for a conservation easement to protect productive agricultural lands. Total project cost: \$5,443,500.



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Board Grants Hearing On 'Ewa Marina

Somehow, Michael Kumukauoha Lee got the Land Board to agree to include discussion of ancient Hawaiian burials in a contested case hearing on Haseko Hawai'i, Inc.'s efforts to shrink the size of its marina in 'Ewa, O'ahu.

On February 11, the board voted to grant Lee a hearing, but restricted the scope of the hearing to issues raised by the reduction in size of the marina from 70 to 53.76 acres.

Lee, a native Hawaiian cultural practitioner who has been fighting the marina development for more than a decade, had asked that the scope of the hearing not be restricted since he was concerned that significant burials could be harmed when Haseko dredges the channel to connect the already constructed marina to the open ocean. Lee presented the board with a large stack of documents that he believed confirmed that ali'i were buried in the area.

Sam Lemmo, administrator for the Department of Land and Natural Resources' Office of Conservation and Coastal Lands, suggested that burial issues and the contested case on shrinking the marina could be handled separately. He added that cultural impacts with regard to the entrance channel had already been addressed in hearings held years ago by the board. (It should be noted that a significant burial was discovered near the marina shortly after hearings concluded.)

Lemmo added that the Conservation District Use Permit for the project allows for the evaluation of new information. He said he

would have to review the documents Lee had presented with the state Historic Preservation Division to determine what precautions, if any, needed to be taken.

"I don't think that prevents us from moving forward," he said.

Native Hawaiian Legal Corporation attorney David Kimo Frankel, however, asked the board to consider whether separating the two issues precluded the subject of burials from ever coming back to the board.

Lee also mentioned that approval of the OCCL's recommendation to limit the case's scope would "take me immediately to Circuit Court."

After conferring with their deputy attorney general in an executive session, the board chose to approve the OCCL's recommendations. However, before the board's vote, interim chair William Aila assured Lee that all of the documents regarding burials that he submitted that day would be made available to the contested case hearing officer.

The board rejected a request for a contested case hearing filed by Glenn Oamilda of the 'Ewa Beach Community Association. Oamilda contended in his petition that Haseko's decision to shrink the marina had "drastically changed the mauka water flow pattern of the 100-year flood and heavy rain water."

The OCCL recommended denying his petition because he failed to identify any interest in Haseko's property.



Attorney Wants Trail On Parker Ranch Lease

Big Island attorney Margaret Wille thinks state ranch land that's been controlled by Parker Ranch, Inc. since 1976, is too beautiful and culturally significant to be fenced off. Wille, who lives adjacent to the land, told the board at its February 11 meeting that the

property should be more open to the public. She suggested that a perimeter trail around the 2,600 or so acres included in the lease would be ideal.

"It's like a baby Diamond Head," she argued, adding that the state could make much more money allowing tours on the property than merely letting the ranch continue to lease it for another 20 years at less than \$5,000 a year.

Wille said she did not oppose the ranch's use of the land, but thought that multiple uses were possible. She asked that the board deny a request of Parker Ranch to extend its lease to February 2031 and instead approve a short-term extension. If it did not, she said, she would appeal the board's decision.

A report to the board from the DLNR's Land Division adds that a county-related organization called the South Kohala Community Development Plan Action Committee had inquired about public access to the lease area. The ranch, however, is concerned about vandalism to its fencing and infrastructure, it adds.

"Staff believes that any public access that could be granted would need to be coordinated with the lessee and possibly with the Division of Forestry and Wildlife if the purpose of the access is to reach the Kohala Forest Reserve mauka of the lease parcel. The unresolved access issue should not be a bar to the approval of the lease extension," the report states.

It adds that the ranch has worked with the Kohala Watershed Partnership on developing and maintaining restoration areas within the lease.

"Approximately 250 acres have been excluded from grazing and ungulate proof fencing has been installed to protect the area," it states.

Representatives from Parker Ranch and Hawai'i Baptist Academy asked that the board approve the lease extension, which it did unanimously.

— T.D.



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