

Environment



Hawai'i

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Lines in the Sand

To all those who say you can't fight city hall or those with deep pockets, or who assert that the once-forested areas of the islands are too degraded to be restored, or who are daunted by a years-long struggle to claim your rights, the articles in this issue provide a strong rebuttal.

As our cover story relates, the Hawai'i Supreme Court has upheld the view of Kaua'i activists who contend the state erred in a dispute over where to locate a shoreline on Kaua'i's North Shore.

We also report on the same court's decision to uphold two lower court decisions supporting the Land Board's imposition of a \$4 million fine against James Pflueger's Pila'a 400, LLC, for damaging state lands in the Conservation District more than a decade ago.

We provide a brief update on other instances of activists standing up for their rights against the state Commission on Water Resource Management. Finally, we're delighted to present a good-news story on the successes in restoration that have occurred at two sites on Maui.



A recent Hawai'i Supreme Court decision suggests that this naupaka thicket on Craig Dobbin's property has been artificially induced.

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State High Court Sides with Activists In Kaua'i Shoreline Certification Case

The state Board of Land and Natural Resources did pretty much everything wrong when it approved Wainiha, Kaua'i property owner Craig Dobbin's certified shoreline in 2010.

That's the impression one gets from reading the January 27 Hawai'i Supreme Court decision in a case brought against the Land Board, Dobbin, and Dobbin's consultant, Wagner Engineering Services, Inc., by area residents Caren Diamond and Beau Blair.

Blair and Diamond had requested a contested case hearing on the certification in 2008, arguing that the shoreline had been manipulated with salt-tolerant vegetation. Naupaka had been planted and artificially induced to grow into the beach area, they claimed. But in its decision and order in the case, the Land Board gave short shrift to evidence and testimony they submitted explaining how the property had been altered

and where the waves historically washed in that area.

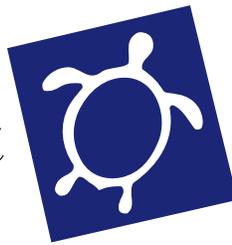
Diamond and Blair appealed to the 5th Circuit Court, which found that the Land Board had arbitrarily and capriciously ignored the historic evidence presented by the two women. Circuit Judge Kathleen Watanabe remanded the case back to the Land Board, which issued an amended decision in 2010. In that decision, the board again dismissed Blair's and Diamond's evidence and set the shoreline exactly where it had in 2008.

Blair and Diamond appealed to the Intermediate Court of Appeals, which sided with the Land Board and reversed the lower court's ruling.

When the Supreme Court heard oral arguments last year on the Land Board's 2010 amended decision, it was clear from questioning that several justices were not impressed

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Environment Hawai'i



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NEW AND NOTEWORTHY

Council Loses an Advisor: Robin Baird, one of the leading experts on false killer whales in waters around Hawai'i, has resigned from the Protected Species Advisory Committee of the Western Pacific Fishery Management Council (Wespac).

Baird resigned effective January 31. The reason given, in a letter to Wespac executive director Kitty Simonds, was the behavior of Milani Chaloupka. Chaloupka, who is an expert in population modeling, sits on both the PSAC and the council's Scientific and Statistical Committee.

In late January, the PSAC met. Afterward, Baird made a presentation on his false killer whale research to a subcommittee of the SSC. Following a "long and detailed power point presentation," Baird told *Environment Hawai'i*, the members of the subcommittee "started asking questions. At first, they were all very legitimate questions about the analytical techniques, methodologies, et cetera.

"After a while, it deteriorated into what could best be described as a very adversarial situation. From asking clarifying questions, or questioning aspects of the science, it went to almost like being on the stand in a court case. Instead of being asked a civil question, it turned into criticism of me for not providing more information to them, not providing information in advance. It was bizarre."

Baird had not been provided with an agenda for the SSC subcommittee. He had been asked only to present information on his analytical work. "If you're going to have an agenda, if you want things to be discussed, it's a good idea to give people making the presentations a heads-up," he said. "That wasn't done...."

"The line of questioning became so unpleasant that I packed up my stuff and walked out of the room. It was abusive behavior. Life is too short for me to put myself in those kinds of situations."

In his resignation letter to Simonds, Baird wrote, "I'm not willing to be involved in what I consider to be an abusive work environment, and Milani's behavior in the SSC's subcommittee meeting was both unprofessional and highly inappropriate. In normal work environments, it is clear to me that his tone and adversarial questioning would be considered abusive behavior and would not be tolerated, and I am certainly not willing to tolerate it."

Baird concluded by stating that the council is ill-served by Chaloupka's presence on several advisory panels: "having someone who engages

in such inappropriate and abusive behavior serving on several Council committees does not benefit the Council in any way, and Council members should take this into consideration."

Jim Lynch, a Seattle attorney who chairs the Protected Species Advisory Committee and who also sits on the SSC, declined to comment on the events that led up to Baird's resignation

Prove It: Kaua'i County already has a problem with luxury residences with no ties to farming of any kind being built on agricultural land under the guise that they are "farm dwellings." Wary that something similar may happen with two proposed "conservation management" structures in Kilauea, Kaua'i, the Kaua'i Planning Commission is pressuring landowner Charles Somers to prove why, in addition to his sprawling, 10,000-square foot hilltop complex (a.k.a. his "farm dwelling"), he needs to build a 2,500 square-foot conservation manager's residence and a maintenance building that was originally designed to include a loft and a bathroom.

The Hawaiian Islands Land Trust holds two conservation easements over 150 acres of Somers' property, but they do not require him to conduct any conservation activities. If he chooses to, however, the trust would need to approve a habitat conservation plan.

Because the new structures are purported to serve conservation management activities, some commissioners wanted to see the plan first.

At its January 28 meeting, commissioners deferred taking action on Somers' request to modify the zoning, use, and SMA permits the county granted in 2008 for the initial residence. Instead, the commission directed Somers' attorney, Jonathan Chun, to return to the commission with a draft habitat conservation plan that has received at least tentative approval from the land trust.

Given that preparing even a draft plan will likely take some time, Chun agreed to waive the 60-day time limit the commission has to decide on Somers' request. Chun added that although the easements don't require Somers to actively conserve the property, such commitments can be achieved through other means, perhaps through permit modifications.

Commissioner Angela Anderson suggested that Somers should also be required to submit a farm plan, since the property is zoned for agriculture.

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Quote of the Month

"We need assistance in sending a strong, clear message that [film productions] cannot come to our community, do what they want, where they want, how they want and then actually evade officers and evade boating officials and actually deny that they were conducting filming activity. It's just completely unacceptable."

— *Donne Dawson,
Hawai'i Film Commissioner*

BOARD TALK

Film Office Seeks DLNR's Help With Unauthorized Productions

Hawai'i film commissioner Donne Dawson begged the state Board of Land and Natural Resources for help with certain "misbehaving" productions.

"We need assistance in sending a strong, clear message that they cannot come to our community, do what they want, where they want, how they want and then actually evade [state enforcement] officers and evade boating officials and actually deny that they were conducting filming activity. It's just completely unacceptable. We need your help in doing our job [by] enforcing and imposing the strongest fine allowable to do by law," she told the board on January 24.

With regard to the fine, she was referring specifically to Volcom, Inc., which had been denied a filming permit but proceeded last August with filming professional skaters using a floating half-pipe ramp that had been towed offshore of Wai'anae.

The film office has no enforcement authority, but does have agreements with the Department of Land and Natural Resources and the Department of Transportation to help police filming on lands owned by the two departments. At the Land Board's meeting, the DLNR's Division of Boating and Ocean Recreation recommended fining Volcom \$5,000 for conducting commercial activities out of the Wai'anae Small Boat Harbor without a permit from the agency.

DOBOR administrator Ed Underwood said Volcom representative Clint Moncata had agreed to pay the fine, but Dawson urged harsher punishment.

Volcom is a \$600 million company and a \$5,000 fine "amounts to not much more than a standard location fee for a film production. I don't believe it's going to act as a deterrent," she said.

Moncata was apologetic, but said the production needed to go forward because there was a lot of equipment in place and people had come from out of town to film, Dawson continued. Moncata did not testify at the meeting.

She also said Volcom had filmed with the ramp at Ahu O Laka (also known as the Kane'ohe Bay sand bar). Although a DOBOR commercial use permit was not needed for that, "the fact of the matter is they needed a film permit," she said.

The film office is struggling with several

productions that have "been abusive of their filming situation that have refused to rectify the situation or the damage," she said.

The History Channel's *American Jungle*, a "reality show" based on Hawai'i island about rival hunting clans, is one problem show, Dawson noted. The DLNR launched an investigation last year into whether the show violated department rules and regulations, such as hunting at night, with spears, or in state forest reserves, among other things.

"The [DLNR] Division of Conservation and Resources Enforcement is alarmed by the hunting practices depicted in the *American Jungle* series," DOCARE chief Randy Awo said in a press release last November.

"We're seeing if they're going to come back. We've had some positive discussion with executives," Dawson said.

The pilot for a "sister show" to *American Jungle*, called *The Arc*, was recently shot without permits at Pohoiki, also on the Big Island, she continued. That reality show was expected to start filming in January. Based on her discussions with the DOCARE, the vessel to be used on the show is "questionably seaworthy," she said.

Another show using DOT lands that just wrapped filming nearly caused two accidents, she continued, "one involving myself."

"That's just the tip of the iceberg. We are struggling predominantly with the reality genre. They're difficult to control," she said.

Although the office has no enforcement powers, she said a bill introduced in the state Senate (SB 2079) could help. The bill would make reality, unscripted, and "soft-scripted" television ineligible for film production income tax credits.

Dawson also said the film office's agreements with the DOT and DLNR could be amended to include stiffer language regarding enforcement.

With regard to Volcom, given Dawson's concern that \$5,000 was too small a fine, at-large board member David Goode asked, "what number would send a message?"

Hawai'i island board member Robert Pacheco noted that the law allows the board to impose a fine of up to \$10,000 for a first offense. Pacheco and Maui board member Jimmy Gomes asked about the possibility of assessing administrative costs, as well.

"I hope we could [have them] replace the

piers in Wai'anae harbor and call it even," Underwood joked.

Gomes, however, was serious. "We should be very concerned," he said. "If we could implement a max fine so it's not just a slap on the wrist and come to the board with an X-number of admin fees, I think that's a protocol we should follow."

O'ahu board member Reed Kishinami then moved to increase the fine to \$10,000 and asked DOBOR to include administrative costs in any future actions. His motion was unanimously approved.



Seawater Air Condition Must Post \$4.5M Bond

DLNR Land Division administrator Russell Tsuji doesn't want the state getting stuck footing the cost for removing an abandoned six-foot diameter pipe installed by Honolulu Seawater Air Conditioning, LLC. So on February 14, his division recommended that the Land Board amend the company's perpetual easement to require the company to post a bond equal to the cost of removal of most of the pipe, about \$4.5 million.

Years ago, when the Natural Energy Laboratory of Hawai'i Authority took over management of Keahole Point from a now-defunct state agency, a lot of money was spent removing large pipes that had been left loose on the ocean floor and were damaging coral, Tsuji said.

HSWAC grudgingly agreed to post the bond, so long as it could pay the amount over 25 years. For years one through ten, the company will pay about \$45,000 a year. By years 21 through 25, it will be paying about \$456,000 a year. The company's easement requires it to maintain the pipe for the easement term, so the bond would be used only if the company somehow abandoned the pipe or was otherwise unable to fulfill its obligations.

Although the bond amount won't cover complete removal, "that's all they could afford," Tsuji told the Land Board last month. He added that the company insists that the pipe, at least in the nearshore area, will not move around and damage marine resources.

"Truthfully, we're not terribly pleased with it, but we have no choice. We need the easement," company CEO Eric Masutomi said of the proposed amendment to add the performance bond.

He said he wasn't worried that his pipes would come loose, like those at NELHA. "The engineering is quite sophisticated," he

said of his project. The pipe, once installed, will be an asset “worth a tremendous amount to another user,” he said.

Board members seemed unsure of whether the entire bond amount was necessary. But because the easement amendment would allow the Land Board to relieve the company from having to post the full amount, board members unanimously approved Tsuji’s recommendation.



Board Grants Permit For Schweitzer Seawall

With great trepidation,” Sam Lemmo recommended on February 14 that the Land Board approve an after-the-fact Conservation District Use Permit for a seawall and stairs in Keonenui, Maui.

“We have an aversion to [shoreline] hardening,” Lemmo, administrator of the DLNR’s Office of Conservation and Coastal Lands, told the board. But in this case, the seawall and stairs owned by Henry and Diane Schweitzer are flanked by two other seawalls and the backshore is clay. In fact, most of the shoreline along Keonenui Beach has been replaced by seawalls, an OCCL report to the board states.

Removing the Schweitzer wall would serve no purpose, Lemmo said.

The 40-to-50-foot long wall was built in the 1980s and, according to the Schweitzers’ attorney, Paul Mancini, the Schweitzers thought their contractor had obtained all the necessary permits. Years later, they found out he had not.

In 2012, the Schweitzers paid the DLNR \$6,000 in fines and administrative costs for violating Conservation District rules. They opted to seek a permit to keep the wall rather than remove it.

The Land Board approved Lemmo’s recommendation to grant the permit. The couple still needs to obtain an easement from the DLNR’s Land Division to cover the 500 or so square feet of state land that the wall and stairs occupy.



Hilton’s Friday Fireworks Get Discount from New Fee

The fireworks display that Hilton Hawaiian Village has put on every Friday for the past 25 years is a kind of public service. That’s basically what the Land Board decided last month when it chose to exempt the hotel from a new right-of-entry fee it imposed last year on all aerial fireworks dis-



PHOTO: HILTON HAWAIIAN VILLAGE

Crowds regularly gather on Waikiki beaches to watch the Hilton’s Friday night fireworks show.

plays. For years, the fee was a nominal \$50. But last June, the Land Board increased the fee to \$550 in recognition of the fact that the public is excluded from safety buffer zones and staging areas during these displays.

On February 14, Land Division agent Kevin Moore told the board that given the 200,000 square foot safety zone imposed by the Hilton during its fireworks shows, the department, using standard commercial use rates, could charge \$19,000 a day. However, the division has settled on \$550 as a compromise, he said.

Last October, Hilton has asked that its Friday shows, which are put on solely for its guests and the public, be exempt from the fee increase. The Land Division recommended denial.

At the Land Board meeting, Hilton Hawaiian Village vice president Jerry Gibson provided several pictures of the crowds that gather on the beach to watch the hotel’s Friday show.

“The three thousand people on the beach await the first flare and applaud the last boom as one more successful Friday night has ended. Equally important, local businesses which serve both local customers and visitors have showcased the Hilton fireworks event as a benefit to their respective business operations,” he wrote in testimony to the board.

What’s more, each Friday, some 500 to 600 people from the military’s Hale Koa hotel “wait with anticipation to watch the show,” he wrote.

Not including the permit fee, Hilton spends \$446,887 a year for the Friday fireworks, he wrote.

The Hilton agreed to pay the increased fee for those fireworks shows that outside parties pay to be put on. Gibson told the board that it does about eight to ten of those a year in addition to the Friday shows.

“We’re not asking for leeway on things we get revenue from,” Gibson said.

Rick Egged, president of the Waikiki Improvement Association, added that on a nor-

mal night, there are very few people on the beach.

Land Division agent Barry Cheung said over the years he had received only one complaint from a member of the public excluded from the beach for a fireworks show.

At-large board member Sam Gon, who had initially commented that the fee should have been \$19,000, said he was swayed by the public testimony. He added, “My family has enjoyed this from their lanai.”



Wai‘anae Non-Profits Get 30-Year Lease

On February 14, the Land Board granted a 30-lease for 1,122 acres to two non-profit groups in Wai‘anae — Ka‘ala Farm, Inc., and Ho‘oumau Ke Ola.

Ka‘ala Farm, which owns and leases two adjacent parcels, previously held a maintenance right-of-entry to the culturally rich property. Formerly part of the state Department of Agriculture’s Wai‘anae Agricultural Park, the land was returned to the DLNR in 2012. The DOA had cancelled the lease of its previous tenant, who had reportedly let cattle roam wild.

The groups plan to use the property, once known as Wai‘anae Valley Ranch, for a variety of educational, cultural, agricultural, and workforce development programs. Those programs include trail restoration, aquaponics, community gardening, organic farming, animal husbandry, and a therapeutic art center, according to a Land Division report to the board.

“Ho‘oumau Ke Ola is a residential and outpatient substance abuse treatment program that incorporates native Hawaiian culture into its curriculum. A large component of the program is reconnecting clients to the land through once a week work days at Ka‘ala Farm. KFI and HKO will continue this partnership as they restore the lands of Wai‘anae Valley Ranch,” states the 2012 application by Ka‘ala Farm.



Land Sale Forces Resolution Of Conservation District Violation

The DLNR Office of Conservation and Coastal Lands is finally close to resolving a six-year-old violation case involving the

conversion of an old coffee mill at Pohoiki, Hawai'i, into a single family residence.

On January 24, the Land Board fined the homeowners, Lawrence and Ida Smith, \$14,000 and assessed \$1,000 in administrative costs. They were given six months to file an after-the-fact Conservation District Use Application for a downscaled home and a year to pay the fine.

The violation first came to the OCCL's attention in 2008 via a complaint, but the agency did little more than correspond with the couple and its representative, Ken Fujiyama. But recently, "a new opportunity has arisen that requires them to resolve [the violation]," OCCL administrator Sam Lemmo told the Land Board at its meeting in January.

Hawai'i County plans to buy 26 acres at Pohoiki from the Smiths to add to its Isaac Hale beach park. But the Smiths cannot subdivide their 35-acre parcel – which would require a Conservation District Use Permit – without first resolving the outstanding Conservation District violation.

"This was the hammer," said attorney Sue Lee Loy, who represents the Smiths.

Earlier this year, the Smiths offered to pay a fine of up to \$15,000 and to file an after-the-fact CDUA for the mill conversion, which Lemmo said he thought was reasonable.

"As long as they pay the fine, we'd allow them to file [a CDUA] for a single family residence and the subdivision," Lemmo said.

"Why did it take so long to be resolved?" Maui Land Board member Jimmy Gomes asked.

"It's a good question. ... There's no excuse," Lemmo replied. "A lot of times we have cases that are just hanging out there. We can't get people to make moves."

According to Hawai'i County property manager Ken Van Bergen, the county has been working toward acquiring the Smiths' property since 2010 and was initially unaware of the Conservation District violation. He noted that the Smiths had also faced a county violation, but that had been resolved.

Although Lee Loy said the Smiths are eager to sell the property, they can't pay the fine right now and would prefer that it be paid when the county's purchase of the subdivided property closes. The county plans to pay \$1.515 million for the property.

Van Bergen asked the Land Board whether it could grant a conditional approval of the subdivision right now, but Lemmo said he could not recommend such an approval.

"The rule is clear: we can't process until

A Tale of Two Tracts: Success Stories Of Restoration on Slopes of Haleakala

The Nature Conservancy's Waikamoi Preserve in east Maui has been mostly free of feral pigs and goats for the last two decades. But what has that meant for the native vegetation on the high slopes of Haleakala?

In 2008, four researchers – Guy Hughes and Eric Brown, with the National Park Service's Kalaupapa National Historical Park, and Alison Cohan and Mark White, with TNC – set out to determine how conditions on the ground had changed since 1994, roughly when the ungulates were removed, by retracing transects that were established then as a kind of "before" baseline.

On the opposite, leeward side of the mountain, over roughly the same period, hundreds of volunteers led by the indefatigable Art Medeiros worked to restore native vegetation on a small, four-hectare tract of what had once been a species-rich dry forest, reduced to mostly non-native grass cover by more than a century of grazing.

In 2012, Medeiros, with the USGS' Pacific Island Ecosystems Research Center on Maui,

the violation is resolved," Lemmo said, adding, "What we're asking for is a pittance for allowing the violation to persist for so long."

Lemmo was also unsure whether subdivision could proceed without the fine having been paid.

The deputy attorney general advising the board that day said the board's decision to find a violation and impose a fine was "not the forum to determine whether violations have been adequately cured. ... If it becomes a hangup, deal with it later. You have a narrow issue before you."



Scientist Tries Electrofishing To Control Invasive Fish, Frogs

What's going to happen to all those frog legs?" joked Big Island Land Board member Robert Pacheco.

On January 24, the Land Board unanimously granted a one-year special activity permit to scientist Robert Kinzie to remove mosquito fish and bullfrogs from Hale'iwa's Uko'a wetland using an electrofishing device.

Kinzie, of SWCA Environmental Con-

and Erica von Allmen and Charles Chimera, with the Pacific Cooperative Studies Unit of the University of Hawai'i, compared vegetation on the area where the restoration activities occurred to that on a control area, which was nearly identical in vegetation at the time the restoration work began in 1997.

The results of the two research efforts were published in the January issue of *Pacific Science*. And, at a time when news from the frontlines of environmental management is generally pretty grim, the two articles are a welcome beacon of hope.



At Waikamoi, Removing Pigs, Goats Makes All the Difference

High on the windward slopes of Haleakala, an area of 428 hectares has been transformed. At the lower elevations, the landscape is characterized by a rainforest, but as the elevation increases, rainfall declines. At the higher elevations, at the time the

sultants, is helping First Wind and landowner Kamehameha Schools manage the wetland as a habitat for the endangered Hawaiian hoary bat and endangered waterbirds.

Reducing the number of invasive predators will make more insects available to the bats and birds, and will also reduce predation of waterbird chicks by bullfrogs, a DLNR Division of Aquatic Resources report to the Land Board states.

The report also states no native fauna have been documented in the wetland in recent years.

According to DAR biologist Alton Miyasaka, electrofishing has not been used much in Hawai'i.

"If you want to do selective removals, we feel there's a possibility it can be effective. We want to tag along with them to see if it's something we can apply elsewhere," he told the Land Board.

Kinzie testified that electrofishing is commonly used by fisheries biologists, but has not really been used for alien species control and "is something we're trying to take a look at."

First Wind operates a 69 megawatt wind farm on Kamehameha Schools land at Kawailoa on O'ahu's North Shore. — *T.D.*

baseline transects were established, the vegetation was characterized as subalpine shrubline shifting to a grassland, dominated by non-native species, in the highest regions.

There was no effort to replant species or manage the area in any way other than through the removal of the feral animals. Yet the landscape changes were dramatic. As the authors write, “we observed a consistent pattern of change on two parallel transects established within a fairly homogeneous subalpine habitat during a relatively short time scale, suggesting that the vegetation community was shifting to an assemblage with a higher abundance of native flora.”

They suggest three reasons for the shift: first, the release of native species, mosses, and woody species “from severe feral animal disturbance;” second, “the replacement of grass vegetation groups with native shrub, native fern, and lichen groups;” and, third, “relatively drier subalpine conditions” in 2008 than existed in 1994. The first and second reasons are directly related to the absence of the ungulates.

As to the third, they write: “Under increasingly dry conditions, one might have predicted a reduction in lichens and bryophytes rather than increases. However, we documented an increase in lichens and bryophytes by more than 300 percent... suggesting that the changes are likely attributable to ungulate removal.”

As the lichens and mosses moved into higher elevations, the non-native grasses declined, with grass cover being halved during the study period while “native ferns increased significantly, and native shrub cover tripled.” In the lower-elevation forested habitat, the authors found, mosses increased in both the understory and upper layers of the forest.

Their conclusion? “Feral animal removal was effective in promoting native habitat recovery and is recommended as a recovery program strategy that should be prioritized in the largely native areas with a limited presence of invasive alien plant species.”



Intensive Management Pays Off at Auwahi

At Waikamoi, managers had a lot to work with. Although the native landscape had been altered by goats and pigs, the most severely degraded areas were adjacent to a relatively intact native ecosystem, which allowed them to be repopulated with native plants naturally.

At Auwahi, on the other hand, the study site was nowhere near anything that resembled

a native forest — and had been that way for decades. By the 1960s, the authors note, 95 percent of the Auwahi dry forest had been destroyed. Auwahi had become “a museum forest (i.e., a high-diversity forest lacking recruitment).”

Private landowner Haleakala Ranch attempted to protect the remaining forest by fencing out ungulates — “which unfortunately accelerated kikuyu grass growth and increased tree mortality... and minimal conservation benefit was realized.”

In 1997, Medeiros and his volunteers and colleagues began what is described as “a multiphased restoration effort” — removal of ungulates, suppression of kikuyu grass with herbicides, and the mass planting of ‘a‘ali‘i (*Dodonaea viscosa*) on four hectares. The



PHOTO: USGS

An aerial shot of the Auwahi dry forest restoration area clearly shows the boundaries.

‘a‘ali‘i was to function as a nurse plant: hardy, easy to propagate, and quick to grow, it could provide a sheltering habitat for later plantings of rarer species.

Fifteen years and countless volunteer days later, the difference between the managed tract and the control area was dramatic. In the managed tract, ground cover from non-native grasses was reduced 73 percent. Cover from native species had increased by nearly 58 percent. Vegetation in the control area, meanwhile, was unchanged.

What’s more, some of the rarest dry forest species had begun to reproduce on their own in the restoration site. Among those was ‘aiea (*Nothocestrum latifolium* Gray). In 2012, the authors note, “two wild *Nothocestrum latifolium* seedlings were discovered... distant from mature *Nothocestrum* individuals, apparently the result of seed dispersal by birds, likely the non-native *Zosterops japonicus* (Japanese white-eye). Though modest, this recruitment represents the only currently known natural regeneration of the species,” which is the sole native host plant for caterpillars of the endangered Blackburn’s spinx moth (*Manduca blackburni*).

Unfortunately, one non-native tree seems

to have taken advantage of the same conditions that favor the natives: the tree poppy, *Bocconia frutescens*. “Although most non-native species declined dramatically,” the authors write, the tree poppy recruitment was higher than it was in 1997 and also in the control area. “As such, weed control in the restoration area... is currently devoted predominantly to *Bocconia*... These results demonstrate the vulnerability of even relatively restored ecosystems to non-native woody species such as *Bocconia* with the ability to recruit seedlings in shaded or semishaded sites.”

Along with the need to control weeds is the ongoing requirement to keep out the pigs. The authors relate an incident in 2010 that illustrates the pigs’ predilection for the most endangered plants: that year, “two juvenile feral pigs entered the restoration site, their smaller size allowing entry through perimeter fence mesh (since repaired). Before their removal, the pigs apparently searched for and destroyed the entire outplanted population of approximately 100 established *Vigna* [*Vigna oahuensis*] while minimally impacting other plant species. The pigs

excavated the plants, consuming all parts including roots.” Still, two years later, “24 newly emerged *Vigna* seedlings were recorded in count plots (all near original plantings).”

The Hawaiian dry forest is one of the most imperiled ecosystems and, “without development and implementation of appropriate management strategies,” the authors write, “remaining Hawaiian dry forest will likely disappear within the next century.” But the multiphased approach to restoration of degraded areas “offers one strategy to conserve and restore tracts of dry forests in Hawai‘i and perhaps elsewhere,” they conclude.

— Patricia Tummons

For Further Reading

See the articles in the January 2014 issue of *Pacific Science* (Volume 68, Number 1):

“Subalpine Vegetation Change 14 years after Feral Animal Removal on Windward East Maui, Hawai‘i,” by Hughes *et al.*

“Dry Forest Restoration and Unassisted Native Tree Seedling Recruitment at Auwahi, Maui,” by Medeiros *et al.*

Hu Honua Creditors Jam Hilo Court With Applications for Mechanic's Liens

For a few weeks in January and February, keeping up with the filings for mechanic's liens against Hu Honua Bioenergy required almost a full-time presence in Hilo's 3rd Circuit Court.

On February 4, an article by John Burnett in the *Hawai'i Tribune-Herald* noted that almost \$37 million in recent liens had been sought against the company, which is trying to build a 21-megawatt biomass-fueled power plant on the coast near Pepe'ekeo, just a few miles north of Hilo. The same day the article appeared, two more companies filed for nearly \$250,000 in liens.

As of mid-February, here's how things stood:

Hawaiian Dredging Construction Co., the primary contractor, claimed that it was owed \$35,166,862.50;

American Electric Co., based on Sand Island, filed for a lien in an amount just shy of \$1.304 million;

Graybar Electric, Inc., a New York corporation with its headquarters in St. Louis, is seeking \$48,392.64 from American Electric, Hu Honua, and Hawaiian Dredging;

General Supply & Services, Inc., also known as GEXPRO and based in Connecticut, claims Hu Honua owes it \$53,268.80;

Transglobal Energy, Inc., based in Georgia, is seeking payment of \$200,558.51.

T Bailey, Inc., of Seattle, says it is owed \$399,474.25 for work it has done to install tanks on the site.

Altogether, at press time creditors had filed claims totaling \$37.17 million in unpaid invoices and carrying costs. The amount grows each day, as interest accumulates on the balance. Also, every creditor is also asking for attorneys' fees and other costs associated with the court filings.

Yet another lien was filed in December by Wesco, which sought \$215,174.74. That was withdrawn on January 17, however.

In attachments to the court filings, unpaid invoices suggest Hu Honua began to fall in arrears last spring.

On February 7, the company released a statement announcing that it had "engaged Performance Mechanical, Inc. (PMI) as its new general contractor for work remaining on-site."

PMI, it went on to say, "has extensive boiler and power plant experience with utility-grade facilities, including several installations in

Hawai'i. Once the contractor is on board, construction is expected to return to full staffing levels by mid-summer."

In the face of the mounting debts, Hu Honua has managed to raise a line of credit approaching \$35 million. Documents filed at the Bureau of Conveyances in mid-January show that Island Bioenergy, LLC, which is the sole member of Hu Honua, had advanced \$8.772 million to Hu Honua, was pledging another \$6.228 million in future loans, and was also considering an "accordion advance" of \$20 million, in "the lender's discretion," for a total capitalization of \$35 million. Signing on behalf of Hu Honua was John G. Sylvia, identified as its president and CEO.

At the same time, Island Bioenergy gave a mortgage to a Delaware entity called NIV, LLC, secured by Island Bioenergy's claim on the Hu Honua property. That mortgage calls for NIV to provide a loan of \$15 million to Island Bioenergy, in addition to "accordion advances" of up to \$20 million. Signing the loan documents as manager of NIV was Jonathan Christianson, a lawyer in Roseville, California. Signing for Island Bioenergy were Harold L. Robinson IV and Peter L. Kleis, both identified as "co-chief executive officers."

Revised SMA Permit Is Upheld

Amid the flurry of court claims, Hu Honua did have one piece of good news. On January 14, 3rd Circuit Judge Greg K. Nakamura ruled in favor of the Hawai'i County Planning Commission in a lawsuit that had challenged the commission's award of a Special Management Area permit for the plant.

Opponents had argued that, among other things, the commission had not given due

consideration to state historic preservation requirements. Nakamura remanded the case back to the Windward Planning Commission, which held an additional hearing and also required an archaeological inventory study be prepared. Once that was done, last fall, the county's attorneys came back to Nakamura with a request for judgment in their favor.

The opponents had also argued that the use of the land for a power plant violated the public trust. In his ruling, Nakamura disposed of that argument, noting that under state law, the public trust doctrine applies generally to water resources but not to land, unless the state has title.

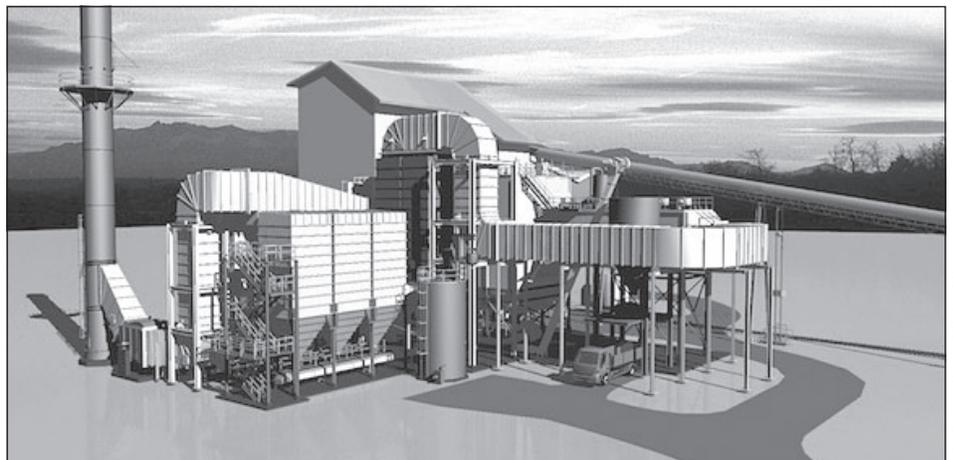
"This case deals with land," he wrote. "It appears that in order for land to be considered a natural resource subject to the public trust doctrine, the state must have title... Moreover, there is an insufficient basis to find or conclude that the land itself has such significance as a natural resource that it can be considered a public natural resource."

Another positive note came in late December, when the state Public Utilities Commission approved the power-purchase agreement between the Hawai'i Electric Light Co. (HELCO) and Hu Honua. The 20-year agreement sets a price of \$253 per megawatt-hour for 20 years. In the same order, the PUC approved the construction of five high-voltage power lines connecting the plant to HELCO lines.

EPA Ruling on Air Permit

On February 7, the administrator of the U.S. Environmental Protection Agency released a decision in the appeal of the clean-air permit that the state Department of Health had granted to Hu Honua in 2011.

The administrator, Gina McCarthy, found in favor of the group that filed the appeal, Preserve Pepe'ekeo Health and Environment (PPHE), on three of the 13 objec-



Artist rendering of the proposed power plant.

LETTER

Further Thoughts on Alternate Energy

Your December front-page article about Big Island forestry and the letter on the last page of the same issue, from Eugene Dashiell, prompt me to write.

It is important to distinguish between two aspects of the alternate energy problem. First is the acceptance of small increments of 'outside' electrical energy by the major utility. For more than a century, the utility operated on the paradigm of central production and distribution, which is the worldwide norm. The system was designed to prevent a local accident (i.e., a car plowing into a power pole) from disabling the whole system. It was not designed for small, highly variable over time, and now usually solar, inputs to the grid. The benefit for the community, of course, is that most solar power systems occupy existing structures and do not require additional land. But for the utility, small, irregular inputs are not a benefit.

Second, there is the failure to consider other sources of energy in the context of their land use. There is no alternative source of energy—other than dispersed solar—that

does not involve use of land or water. To discuss the issue in terms only of energy is incomplete. For example, U.S. Senator Brian Schatz highlights his promotion of wind energy, and in the fine print at the end of his comments, you find he supports an 'offshore' wind energy bill. We need to ask whose 'offshore' he is talking about, and where that energy would come onshore.

As for biomass, my own experience informs me that growing biomass solely for energy will never be a reality, nor should it be. The waste from a higher value product is what should produce energy, and that is exactly what existed in the days of sugar plantations. Also, this is what was promoted as an expansion of forestry programs some 30-plus years ago. I have always held that we could begin a wood for energy program with what we know, but that the program would look entirely different a decade or so hence, as we learn by doing, rather than talking.

Robert A. Merriam
Kailua, O'ahu

tions the group raised to the covered-source permit. The three objections that McCarthy supported are:

That the permit does not ensure that the plant will comply with emission limits for certain so-called criteria air pollutants;

That the permit does not ensure that the plant will comply with emission limits for hazardous air pollutants;

And that the permit record does not adequately explain an exemption to an emission limit that applies during start-up and shut-down procedures.

The Department of Health has 90 days—until early May—to revise the permit in a manner that will address the EPA's objections.

The permit that the state issued was a minor source permit, available to facilities that produce less than 250 tons per year of pollutants. According to documents that Hu Honua submitted in its permit application, the plant would generate just under that amount—246.4 tons per year.

PPHE argued that the formula Hu Honua used to estimate emissions of carbon dioxide, one of the criteria pollutants,

during start-up times was based on limited and low-quality data. If more accurate data had been used, the group argued, the plant would most likely be deemed a major source—and have to be permitted accordingly. It also claimed that the permit contained no enforceable condition that would ensure that emissions of CO and other criteria pollutants, including nitrogen oxides, would not exceed the threshold for a major source permit.

In its arguments that the permit (and Hu Honua) under-estimated hazardous air pollutant (HAP) emissions, the opponents noted that Hu Honua had calculated emissions based on a chemical analysis of the eucalyptus wood that would be burned: "[t]he permit limits are based on chlorine concentration of 0.03 percent, when an average of the 6 eucalyptus samples included in [the appendix] showed an average chlorine concentration of 0.12 percent, and a high of 0.434 percent in rose gum bark.... Hu Honua skewed the chlorine concentration of project feedstock and emissions by omitting the highest concentration feedstock—rose gum bark—and including the

Diamond from page 1

with the way the board had handled the case. In its decision, written by departing Associate Justice Simeon Acoba, the court concluded that rather than Blair and Diamond's evidence being merely anecdotal—as the Land Board had characterized it—in fact, "the only substantial evidence of a historic nature were the years of observations described in the declarations of Diamond, Blair, and [Barbara] Robeson (another area resident), and the record fails in any way to controvert Petitioners' historical evidence."

The Land Board must now revisit the case. The court has directed the board to set the shoreline at the debris line or vegetation line, whichever is mauka.

Given the new law passed last year requiring the state to keep public transit corridors along the beach clear from manipulated vegetation, as well as the Supreme Court's harsh criticism of the board's past actions, it's unlikely the board will set the shoreline at the same place on its third try.

lowest concentration—rose gum without bark—even though the [permit] includes bark in the boiler's feedstock." Had an emission factor more representative of the actual wood to be burned been used, they argued, the outcome would probably have pushed the calculated emissions over the threshold of 25 tons per year for HAPs.

Even using these estimates, Hu Honua calculated that its HAP emissions would come to 23.8 tons per year—once again, very close to the threshold for a major source.

The EPA administrator generally found the arguments on this point convincing and instructed the Department of Health to revise the permit to ensure that the limits on hazardous air pollutants are enforceable.

Other Troubles

As *Environment Hawai'i* reported in our December issue, Hu Honua is being sued by Maukaloa Farms, LLC, the company that owns the roughly 25 acres on which the power plant is sited. Maukaloa Farms claims that Hu Honua is in violation of its lease since it did not seek advance approval for major improvements nor had it complied with bonding requirements. In an initial response to the filing, Hu Honua attorney Gary Grimmer argues the claims lack merit; the improvements Hu Honua is making will actually increase the percentage rent that the company pays to Maukaloa Farms, he says, so the landowner has suffered no injury whatsoever. — *Patricia Tummons*

The following is a summary of the court's major findings:

Post Hoc Justification

When the Land Board first approved Dobbin's certified shoreline in 2008, it stated in its Decision and Order that it had considered only the current year's wash of the waves and not any historic evidence. However, after the 5th Circuit Court remanded the case back to the board, directing it to consider all historic evidence, the board suddenly claimed that historic evidence offered by DLNR staff regarding the wash of the waves during the two preceding years had been considered the first time around.

The Supreme Court did not buy that claim and argued that even if the board had considered some historic evidence, it did a poor job of it.

"Although it removed from the findings of its initial decision discussing only the 'current year's' wash of the waves, the BLNR's discussion of historical evidence in its amended decision appears to be a post hoc justification of its earlier decision," Acoba wrote.

Considering just two years worth of wave evidence and excluding eight years worth of photographic and testimonial evidence from Diamond and Blair failed to meet the 5th Circuit Court's order, Acoba continued.

"[T]he [5th Circuit] Court instructed BLNR to consider all historical evidence, rather than just the historical evidence the BLNR felt was appropriate," he wrote, adding that a 1968 Supreme Court decision (*Ashford*) requires agencies to allow "reputation evidence by kama'aina witnesses" when determining the public-private shoreline boundary.

Vegetation Growth

Chapter 205 of Hawai'i Revised Statutes establishes a policy prohibiting private property owners "from creating a public nuisance by inducing or cultivating the private property

owners' vegetation in a beach transit corridor." And Hawai'i Administrative Rules require vegetation growth to be "naturally rooted and growing" for it to be used to determine a shoreline, the court stated.

The Land Board's 2010 decision to locate the shoreline at a dune crest located on the makai end of the naupaka is "bereft of any indication of how the policies of [Chapter 205] have been enforced," reflecting a disregard of the standards set forth in three previous Supreme Court cases (*Diamond I*, *Sotomura*, and *Ashford*). And Dobbin's naupaka was not 'naturally rooted and growing,' the court found.

The Land Board had wholly adopted Dobbin's and Wagner's argument that the sprinklers on the property were parallel to or faced away from the naupaka and were never intended to water it. However, Acoba wrote, "[i]f the sprinklers' action actually resulted in watering the vegetation as a result of wind or other natural factors, then it is of no import whether the sprinklers were not 'intended to irrigate' the vegetation."

Locating a shoreline where salt-tolerant plants had been grown and were preventing a debris line from forming at the high wash of the waves is contrary to case law and to the legislative purpose of Chapter 205, HRS, he continued.

Expert Testimony

The court also took the Land Board to task over its dismissal of testimony by Limahuli Garden and Preserve director Chipper Wichman on behalf of Diamond and Blair. Wichman, a lifelong resident of the area, had submitted a letter to the Land Board describing his knowledge of the inappropriate use of salt-tolerant vegetation such as naupaka by private landowners.

During the first contested case hearing, the Land Board had accepted the letter as expert testimony. However, in the second hearing, the board determined that Wichman's letter was not in the form of a declaration or affidavit, lacked context, and that it was unclear "whether the person who allegedly authored the document is an expert or what his expertise might be, if any."

First, the court found, state law did not require Wichman's testimony to be submitted in the form of a declaration or affidavit. Second, it did not matter whether Wichman was an expert in anything. His letter, which noted that he had surfed, fished, and dived in the Wainiha-Ha'ena area all his life — and that he was the Limahuli Garden and Preserve director — should have been considered kama'aina witness testimony, Acoba wrote.

(In a footnote, the court pointed out that

the Land Board had accepted Wichman's letter as expert testimony in the first contested case hearing. "Thus, the notion [in the Land Board's decision in the second contested case] that Wichman's testimony was not 'expert' appears to be a post hoc justification to disregard that testimony altogether," the court wrote.)

Photos, Declarations

With regard to the historical evidence Blair and Diamond had submitted, the court pointed out instances where the Land Board just plain got its facts wrong. For example, the board disregarded Blair's photos because her accompanying declaration "did not contain any information as to the dates when specific photographs were taken or who took the photographs." The board also contended that it was impossible to determine what her photos were meant to portray.

Acoba pointed out that Blair's declaration in fact stated that a photo in her Exhibit E "was taken on October 19, 2005 and shows Chris L. Conger [a former DLNR staffer] identifying the location of the shoreline." He also noted that some of her photos were date stamped and that the Land Board even acknowledged that in its 2010 decision.

Blair's declaration also stated that the photos in her exhibits G through N showed the high wash of the waves on Dobbin's property, Acoba wrote.

"The BLNR apparently rejected altogether Petitioners' evidence of the location of the shoreline, thereby ignoring substantial historical evidence," he wrote.

The board was nowhere near as critical of evidence submitted by Dobbin and Wagner, Acoba continued. For example, the board included in its decision a finding that the irrigation system on the property was installed several feet from the naupaka and that the sprinkler heads were aimed parallel to or away from it. However, Acoba wrote, the decision did not explain why that finding — based on an affidavit of former property owner Steve Moody submitted by Dobbin and Wagner — was more persuasive than Diamond's declaration or photos.

What's Ahead?

While it will likely be some time before the Land Board approves a new certified shoreline along Dobbins' property, Diamond says the DLNR is already working to rid Kaua'i's North Shore of artificially planted and/or induced vegetation, in accordance with Act 120 passed by the 2013 Legislature. Already, she said, says several property owners have removed their encroaching vegetation at the DLNR's request. — **Teresa Dawson**

For Further Reading

The July 2013 edition of *Environment Hawai'i* has more background on the case discussed in this article. See, "Kaua'i Shoreline Certification Case Hinges on Credibility of Evidence."

Articles in the archives section of our website, www.environment-hawaii.org, may be viewed and downloaded for free by current subscribers. Others may purchase a two-day access pass for \$10.

Na Wai 'Eha Hearings Resume, East Maui Case Next in Queue

The taro farmers of East Maui were first in line, but it appears they may be last to get served.

The state Commission on Water Resource Management's contested case hearing on the interim instream flow standards of Waihe'e River and Waiehu, Waikapu, and 'Iao streams (collectively known as Na Wai 'Eha) begins this month. Attorneys with the Native Hawaiian Legal Corporation, which has been fighting for the restoration of East Maui streams for much longer than the parties in the Na Wai 'Eha case, are wondering why they're still waiting in the wings.

The NHLC first filed petitions to amend the interim instream flow standards of 27 East Maui streams in 2001. The organization filed the petitions on behalf of Na Moku Aupuni O Ko'olau Hui, and native Hawaiian taro farmers Beatrice Kekahuna, Marjorie Wallett, and Elizabeth Lapenia. They argued that East Maui Irrigation Co., Inc.'s and Hawaiian Commercial and Sugar's diversion of hundreds of millions of gallons of water a day left their clients' taro patches without adequate water.

After tussling for years with the state Board of Land and Natural Resources over the legitimacy of the revocable permits EMI and HC&S have been granted over the years to continue diverting the water across state lands, the NHLC's fight shifted to the Commission on Water Resource Management in 2010. By then, the commission had decided on eight of the stream petitions, amending six of the IIFS and leaving two intact. The NHLC did not oppose that decision, but in July, the commission's decisions regarding the remaining 19 streams left far too little water in the streams in the eyes of the NHLC's clients. In particular, they felt the decisions focused mainly on the needs of aquatic organisms and failed to

take into account the needs of kuleana and holders of appurtenant rights.

Na Moku, Kekahuna and Wallett requested a contested case hearing, but were denied in October 2010. They ultimately appealed to the Intermediate Court of Appeals, which ruled in their favor in November 2012, after the Hawai'i Supreme Court found in August 2012 that constitutional due process required the commission to grant a contested case hearing to parties in the Na Wai 'Eha case whose constitutional rights are affected by stream diversions there.

Several months ago, the Water Commission authorized its chair to select a hearing officer for a contested case hearing on the IIFS for the 19 East Maui streams. Although the contract is still being drafted, CWRM staff confirmed that Dr. Lawrence Miike has been selected as the hearing officer. Miike, a former member of the commission and director of the state Department of Health, is also the hearing officer for contested cases involving Na Wai 'Eha. Miike was also the lone dissenter when the Water Commission decided on the 19 IIFS petitions in 2010.

Resolution for East Maui may still be some years off given the pace of proceedings so far.

"There is no firm start date for East Maui, but it will likely begin a few months after the Na Wai 'Eha proceedings," wrote CWRM's Dean Uyeno in an email to *Environment Hawai'i*.

The Na Wai 'Eha remanded hearing begins on March 10 at the Kahului Community Center and concludes on March 28.

When asked how the commission decided which contested case hearing – East Maui or Na Wai 'Eha – it would address, Uyeno said, "basically ... the order of the court decisions dictated which case would proceed first."

In addition to the Na Wai 'Eha remanded contested case hearing, the Water Commission is planning to hold a separate contested case hearing to determine the appurtenant rights of users of water from Na Wai 'Eha.

Whether that hearing will be held before or after the East Maui contested case hearing has not yet been determined, Uyeno says.

"We won't know for certain until the hearings officer contracting is complete and Na Wai 'Eha is underway," he says.

NHLC's Alan Murakami points out, "We asked for intervention and a determination of appurtenant rights three years ago before the Na Wai 'Eha petitioners did."

West Kaua'i

Although the Maui cases are being handled via quasi-judicial contested case hearings, the July 2013 petition filed by Po'ai Wai Ola and the West Kaua'i Water Alliance to end waste and to amend the interim instream flow standard of Waimea River is being handled administratively.

The community groups, represented by Earthjustice, have argued that the Kekaha tenants of the state Agribusiness Development Corporation are not using all of the 50 million gallons of water a day they are diverting from Waimea River via old plantation-era irrigation ditches in Kekaha and Koke'e.

According to the commission's Lenore Nakama, an investigator has been selected to deal with the waste complaint, but the scope of work is still being drafted. The IIFS amendment petition will be handled by staff, says Uyeno. — T.D.

For Further Reading

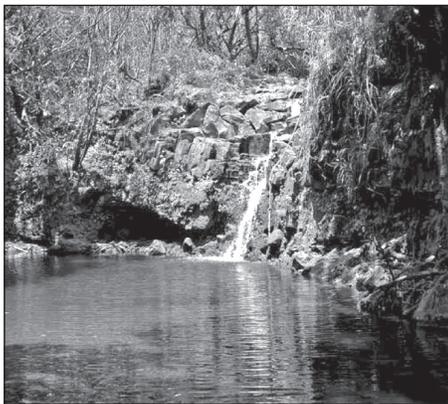
Environment Hawai'i has given extensive coverage to East and West Maui water issues over the years. For more background, see the following abridged list of stories, all of which are available on our website:

EAST MAUI

- "Water Commission Denies Hearing on Flow Decisions for East Maui," November 2010;
- "Water Commission Amends Flows For Six of 19 East Maui Streams," July 2010;
- "Battle Looms Over Waters Diverted from East Maui Streams" and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.

WEST MAUI

- "Supreme Court Orders Water Commission to Revisit Decision on West Maui Streams," September 2012;
- "Supreme Court Weighs Jurisdiction In Appeal of Decision on Maui Water," and "Supreme Court Dissects Arguments In Appeal of Maui Stream Standards," July 2012;
- "Commission's Order on Na Wai 'Eha Baffles Its Most Experienced Member," "The Water Commission: An Idea Whose Time Has Passed (Editorial)," "Maui Agency Is Sued Over Plan to Have A&B Put Stream Water in Municipal System," *Environment Hawai'i* Questions Miike On Dissent in Na Wai 'Eha Decision," July 2010.



Honopou Stream in East Maui.

Hawai'i County Keeps Negotiating With SMA Violator, Despite Court Ruling

The County of Hawai'i Planning Department has won a favorable ruling from the 3rd Circuit Court in a case that challenged the county's ability to set shoreline setback distances. Despite that, the deputy corporation counsel representing the Planning Department, Amy Self, has kept the county's efforts to sanction builder Scott Watson on hold in the six months since the ruling.

As *Environment Hawai'i* has reported, Watson was found by the Planning Department to have violated setback conditions established back in 2006, when the Pepe'ekeo subdivision of which Watson's lot is a part received final county approval. Watson appealed to the county Board of Appeals in late December 2012. Before the BOA heard the appeal, however, Watson's attorney, Steve Strauss, sued the county in 3rd Circuit Court, arguing that the county did not have the authority to establish setbacks.

As the court case was pending, Strauss and Bobby Jean Leithead-Todd, in one of her last actions as planning director, signed an agreement in May in which the county backed off a number of claims against Watson and his co-owner, Gary Olimpia and Hilo Project, LLC, Olimpia's company. Among other things, the county agreed not to fine Watson for his failure to install a silt fence in timely fashion, agreed to allow Watson to relocate public shoreline access, agreed to drop a violation that Watson had not placed a four-foot high fence around a swimming pool, and agreed to lift its stop-work order.

Under the agreement, both parties pledged to "cooperate in efforts to have the court expedite decision [sic] on the issues with respect to a declaratory relief action" concerning the shoreline setback appeal.

On August 22, Judge Glenn S. Hara signed an order denying Strauss' motion for summary judgment or partial summary judgment. Hara took note of the fact that the 2006 Special Management Area permit for the overall subdivision stated, "no house or other substantial structure shall be built closer to the ocean than 40 feet from the top of the sea cliff." Strauss argued that the condition imposed "a substantial burden" on Watson's ability to develop his lot.

"At the hearing on July 19, 2013," Hara continued, "both parties acknowledged that the SMA permit conditions became restrictive covenants burdening the subject property..."

Strauss had argued, however, that the set-

back was more restrictive than what was allowed by state law. "It is apparent from a reading of the applicable statutes," Hara wrote, "that a setback of greater than 40 feet from the 'shoreline' could be set during the subdivision approval process" and in this case is still binding upon the lot owner.

Despite Hara's ruling, neither the county nor Strauss has pushed the case toward trial. And the hearing of appeals of the notices of violation before the Board of Appeals seems to be on indefinite hold.

In September, following Hara's ruling, the BOA was scheduled to hear the case, but Deputy Corporation Counsel Self asked the chair of the BOA for a continuance "to allow the parties the additional time needed to work out a settlement of the matters."

The case was rescheduled for November 8. This time, Strauss wrote directly to the Board of Appeals:

"I request that you reschedule hearing [sic] ... from November 8, 2013, at 10:00 a.m. to an open extension date set by mutual agreement between the parties. The parties are working on settlement [sic], which may result in a withdrawal of the petition and eliminate the need for a hearing."

Rodney Watanabe, the BOA chair, replied on November 15, agreeing to the open extension date. "Please inform the board when you are ready to proceed with a hearing on this matter," he wrote.

Meanwhile, in Ninole

Watson also received a notice of violation in

December 2012 for having a helicopter landing pad atop the house he had built in Ninole, around 20 miles north of Hilo on the Hamakua Coast.

As *Environment Hawai'i* reported last June, Watson and co-owner Laurie Robertson ignored repeated warnings by the county Planning Department that fines were mounting daily.

Even a promise by outgoing Planning Director Leithead-Todd to cut the fines by 10 percent if the violation were resolved by May 23 was not incentive enough to get Watson to resolve the matter.

In late May, the Planning Department forwarded the case to the Corporation Counsel for legal action. At the time, accumulated fines totaled more than \$28,000.

The fines remain unpaid. No legal action has been taken at all by the corporation counsel's office. —*Patricia Tummons*

For Further Reading

The following articles in past issues of *Environment Hawai'i* provide further details on the projects of Watson at Pepe'ekeo and Ninole:

- "Shoreline Easement Lost as Builder Racks Up SMA Violations," December 2012;
- "Builder Defies Planning Department with Helipad on 'Sod Farm' Dwelling," December 2012;
- "Hawai'i County Sends Violation Notices to Builder Over Construction at Two Sites," January 2013;
- "Hawai'i County Is Challenged in Court Over Ability to Determine Coastal Setbacks," June 2013

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Hawai'i Supreme Court Supports \$4M Fine Against Pflueger Company

It's finally settled. James Pflueger's company, Pila'a 400, LLC, must pay the state \$4 million for damaging the reef at Pila'a Bay in North Kaua'i.

After heavy rains in November 2001, a massive wall of mud from Pila'a 400's mauka land, which had been excessively and illegally graded, smothered the beach and reef, as well as a home and car owned by kuleana tenants Amy and Richard Marvin.

After surveying the area in 2002 and finding the once-pristine reef had been extensively damaged, the state Department of Land and Natural Resources' Office of Conservation and Coastal Lands recommended in August 2003 that the Board of Land and Natural Resources fine Pflueger, Pflueger Properties (the land's previous owner), and Pila'a 400 \$5,830,000 and assess \$38,000 in administrative costs.

A contested case hearing involving only Pila'a 400 ensued. After hearing from experts on both sides about the value and extent of the damaged area and the causes of that damage, hearing officer Michael Gibson recommended in December 2004 a reduced fine of \$2,315,000 and about \$70,000 in administrative costs. What's more, he recommended that the fine be used for remediation of Pila'a 400's property, which at the time was estimated to cost somewhere between \$4 million and \$5 million.

In its June 2005 decision and order, the Land Board adopted Gibson's recommendation regarding administrative costs, but imposed a much larger fine of \$3,963,000 that it felt reflected the impact to the bay's intrinsic and commodity values, as well as reef and beach restoration costs.

The board had also agreed with the deputy attorney general representing the DLNR, William Wynhoff, who had argued that allowing the fine to offset remediation costs would

really result in no penalty at all. Wynhoff had argued, and the Land Board agreed, that Pila'a 400 should pay to fix its own property.

Pila'a 400 filed an appeal in 5th Circuit Court. The company argued that the Land Board was required by law to adopt rules establishing a methodology to calculate natural resource damages but that it had not done so. It also contended that because the illegal grading occurred in the Agriculture District and not the Conservation District, the Land Board did not have authority to find a violation. Finally, it argued that the DLNR failed to properly identify the scope of the contested case in the hearing notice. Specifically, Pila'a 400 argued that the DLNR should have stated upfront that it was pursuing the violation case under the rules prohibiting the placement of solid material on state land.

Attorneys for the DLNR and the Land Board responded that the Land Board has the discretion to calculate damages without rules. They also argued that the source of the mud is irrelevant; what matters is that Pila'a 400 placed mud or allowed it to be placed on state submerged lands without a permit. Finally, they argued that the contested case hearing notice clearly explained the scope of the hearing, and properly cited the appropriate chapters of Hawai'i Revised Statutes involved. And if the notice wasn't clear, Pila'a could have asked for a bill of particulars, which it didn't.

The 5th Circuit Court upheld the Land Board's decision, as did the Intermediate Court of Appeals in reviewing the lower court's ruling. Undeterred, Pila'a 400 appealed to the state Supreme Court, which issued its opinion on February 14 siding with the two previous court decisions.

The high court agreed with the ICA that "imposing a single formulaic methodology for assessing [natural resource] penalties would be impracticable."

Justice Richard Pollack, who wrote the decision, also pointed out that although the contested case hearing notice did not cite the specific rule regarding the placement of solid material on state lands, it did note that the hearing was being held to address natural resource damages "due to excessive sedimentation" of submerged lands.

Pollack further pointed out that even Pila'a 400's own attorney stated during the contested case proceedings, "[E]veryone knew this was about mud going on the beach and into the nearshore reef." — *T.D.*

For Further Reading

For more background on this case, read the following articles available on our website, www.environment-hawaii.org.

- "New and Noteworthy: Mud Fine Upheld," February 2013;
- "Appeals Court Hears Arguments in 2001 Pila'a Reef Damage Case," December 2012
- "EPA Imposes Largest Fine Ever for Runoff Violations in North Kaua'i," April 2006;
- BOARD TALK: "Pila'a 400 Appeals Fine for Coral Reef Damage," September 2005;
- BOARD TALK: Pflueger Company Is Fined \$4 Million For Reef Damages at Pila'a Bay, Kaua'i," August 2005;
- BOARD TALK: "\$2.3 Million Fine Is Proposed For Reef Damage at Pila'a Bay," March 2005;
- "Pflueger Contested Case Overshadows Additional Problems at Pila'a Sites," November 2003;
- BOARD TALK: "Contested Case to Resolve Pflueger Damages to Pila'a," October 2003;
- "At Pila'a, Kaua'i, A Reshaped Landscape Sparks Litigation," August 2003;
- BOARD TALK: "Honda Magnate Bulldozes Kaua'i Bluff, Causing Mud to Blanket Pila'a Bay," September 2002.