

Bigeye Bonanza

The more than 140 vessels in Hawai'i's longline fleet have been setting more hooks for bigeye tuna than ever recently, catching large volumes of fish at a record pace. And the industry is eager to keep the trend going.

Problem is, international fishery management organizations have established strict catch limits to end or prevent overfishing of bigeye stocks in the Pacific. In recent years, those limits have resulted in boats having to halt fishing, return to Honolulu, and sit idle for months.

This year, that could happen again, even earlier than last year, if the National Marine Fisheries Service is unable to line up quota transfers from U.S. Pacific Island Territories in time.

In this month's cover story, we detail recent efforts by the Western Pacific Fishery Management Council to keep the vessels fishing uninterrupted — from exploring ways to amend catch quotas to fighting against a recent proposal to expand the Papahānaumokuākea Marine National Monument, around which dozens of Hawai'i vessels fish for bigeye.

Hawai'i Longline Fleet is on Pace to Hit Bigeye Catch Limit in June, Experts Say

At the rate the Hawai'i longline fleet is catching bigeye tuna, it may, for the second year in a row, reach its annual catch limit for the Western and Central Pacific well before the year's end. If that happens, it will once more need the U.S. territories of Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and/or American Samoa to chip in 1,000 metric tons each from their tuna quotas to keep its vessels at sea through December.

At last month's meeting of the Western Pacific Fishery Management Council, industry experts suggested that the fleet will hit its limit in June. That's more than a month earlier than last year, when a large portion of the fleet had to sit idle for two months while the National Marine Fisheries Service (NMFS) completed the rule-making process



Bigeye tuna at auction.

PACIFIC ISLANDS FISHERIES SCIENCE CENTER

to allow the transfer of territorial quotas to the Hawai'i longline fleet.

As of press time, NMFS was still determining whether and by how much the 2015 catch limit, established by the Western and Central Pacific Fisheries Commission

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Scientists Model the Oceans' Future In a Changed Climate, and It's Not Pretty

When it comes to discussions of climate change, much of the debate is focused on that small part of the globe that is — for now, at least — dry land: the impact on cities on or near coastlines; dealing with droughts associated with altered weather patterns; reduced habitat for wild plants and animals; and shifting climate zones for food crops.

For the most part, the ocean gets the attention that is its due only at times when it comes crashing, uninvited, onto coasts, where — as has recently happened in Hawai'i — it takes out roads, undermines buildings, and erodes beaches.

But at the Ocean Sciences Meeting of the American Geophysical Union, held in

New Orleans earlier this year, the marine environment and the vitally important role it plays in the dynamics of climate change were front and center.



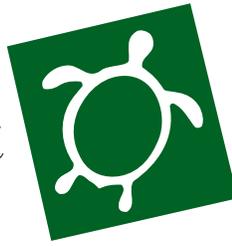
Bye Bye Big Fish

While changes in the ocean may be most visible near or in the shallows — coral bleaching, for example, or coastal erosion — deep-water habitat for fish is being altered as well.

Phoebe Woodworth-Jefcoats, a researcher with the National Oceanic and At-

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Environment



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NEW AND NOTEWORTHY

Energy Office PR Contract: Although the state's Energy Office, within the Department of Business, Economic Development, and Tourism, has a dedicated public information office, it apparently needs to have a public relations firm on call as well. The department has recently decided to award a \$100,000 contract for "public relations and marketing support services" to the firm of Milici Valenti Pack Ng, Inc.

Duties include: "key communications messaging" and "social marketing tactics (i.e., Facebook, Twitter, blogs, etc.)," writing news releases, op-ed pieces, letters to the editor, and "commentaries, articles, etc." Also, the firm is to "prepare speeches, talking points, messages, presentations, and fact sheets," "coordinate and purchase media buys" (advertising, in other words), and "assist with issues management and crisis communications."

Alan Yonan, the Energy Office's public information officer, told *Environment Hawai'i* that the PR contract is nothing new, with the Energy

Office having first sought professional assistance in this area in 2009.

Although the language in the scope of work is broad, Yonan continued, as a practical matter, the Energy Office "has only used the contractor to provide services for which it either lacks internal expertise or does not have sufficient manpower." For example, he said, the office has used contractors to "do the graphic design and layout for many of its external publications, including the annual Energy Resources Coordinator's report."

Tuna Treaty Resurrected: The U.S.-flagged purse seine fleet is once more plying the waters of the South Pacific. The three dozen or so boats in the flotilla were in port for the first two months of the year, after their owners balked at paying the high fees that had been negotiated last year — fees of \$12,600 for each day spent fishing in waters controlled by 15 small island nations in the region.

In early March, the Pacific Islands Forum Fisheries Agency and the U.S. State Department came up with a new scheme. Instead of total payments from the U.S. government and vessel owners coming to around \$90 million for the year, the payments will total around \$66 million. The vessels will have fewer available fishing days in the region, and the Pacific Island countries are now able to sell the freed-up days to other fleets. (For more on the U.S. tuna fleet in the Pacific, see our January 2016 edition.)

Dept. of Emendations, Part I: In January, we erroneously reported that the Western and Central Pacific Fisheries Commission included in its 2016 research plans a proposal by the United States for

a study of spatial management options for tropical tunas. Although there had been no objections to the proposal at the time it was raised, it was not formally adopted.

Dept. of Emendations, Part II: In February, we reported on a lawsuit brought against Hawaiian Legacy Hardwoods (HLH) and several affiliated entities. A sidebar, "The Hawaiian Legacy Companies," described several of those companies, including the Hawaiian Legacy Reforestation Initiative and stated that its board included HLH founder Jeff Dunster and "three employees of Dunster-related companies." John Henshaw, one of those board members, informed us that he was not an employee but rather a consultant to Hawaiian Legacy Hardwoods.

Dept. of Emendations, Part III, GEMS: In March, we reported on the proposal to use Green Energy Market Securitization (GEMS) program funds to pay for air-conditioning in public-school classrooms. We stated that the legislation which set up the GEMS program "limits loans 'to private entities, whether corporations, partnerships, limited liability companies, or other persons.' No mention of 'public sector' entities appears in either the law or the reports from legislative committees that heard the bill three years ago."

Tara Young, the executive director of the Hawai'i Green Infrastructure Authority, established to oversee the program, disagrees. "The legislation states that 'This loan program MAY include loans made to private entities ... as well as direct loans to electric utility customers, on terms approved by the authority.' Please note that the DOE is one of the largest electric utility commercial customers."

Young also disagrees with the statement in our article that the law does not mention "public sector" entities. "Act 211 amended Section 269-121(b) of Hawai'i Revised Statutes," Young wrote. This is the law that established the public benefits fee on Hawaiian Electric customers, a part of which now supports the GEMS program. Young quotes a passage from the public-benefits-fee law, which states: "the state may participate in any clean energy technology, demand response technology, or energy use reduction, and demand-side management infrastructure, programs, and services on the same basis as any other electric consumer."

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Quote of the Month

"I have a little trouble understanding how increasing catch limits is a conservation measure."

— **John Sibert,**
fisheries scientist

Hawai'i Planning Director Questions Whether 'Aina Le'a Complied with Zoning Conditions

Is the 'Aina Le'a project about to start up again?

That development, on about 3,000 acres of land mauka of the Mauna Lani resort in the Kohala district of the Big Island, has been on the books for nearly three decades. However, work to build the infrastructure, highway improvements, and homes (including 385 units of "affordable housing") has stalled out. A long-simmering dispute over compliance with terms established by the state Land Use Commission when it approved a petition to shift about a third of the land into the Urban land use district in 1989, a court challenge to an environmental impact statement, changes in property ownership – all have contributed to the delays.

Now, though, 'Aina Le'a is showing new signs of life.

- Last December, the company submitted an annual report to the Hawai'i County Planning Department, the first such report since 2005. Prompting the submission was a letter last October from the planning director, Duane Kanuha, who reminded the company that filing the annual reports was a condition of the rezoning ordinance.

- The planning consultant retained by 'Aina Le'a, Inc., has drafted a preparation notice to be published in the state's Environmental Notice, in advance of publishing a supplemental environmental impact statement for the project.

- Last month, the company filed with the Securities and Exchange Commission a so-called "free writing prospectus" – essentially, a colorful, 31-page booklet distributed to potential investors that lacks much of the detailed information that the SEC requires to be submitted in a formal prospectus. (The latter was filed last November.)

Still, it may be a while before 'Aina Le'a gets the all-clear to resume work on the project.

Compliance with Zoning Conditions: A dispute has arisen between 'Aina Le'a and the Planning Department over fulfillment of conditions attached to the county rezoning ordinance, originally passed in 1993 and amended in 1996.

In the annual report filed by 'Aina Le'a attorney Alan Okamoto last December, Okamoto claimed that the company had complied with Condition C, which required subdivision plans "for any portion of the

property" to be submitted, and approval secured, within five years of zoning approval. With several time extensions having been granted for compliance with this provision, the new deadline for this was September 21, 2009.

Okamoto pointed to one subdivision approval as satisfying this condition. That was a "bulk lot subdivision," approved in June 2009, that reshaped the five discrete tax-unit parcels in the Urban area into five new parcels of different shapes and size, with one of the emerging parcels being that on which 'Aina Le'a intends to build 482 town-house units (including the 385 units of required affordable housing) and another, adjacent to the town-house development, where 'Aina Le'a has said it plans to develop 70 single-family lots.

Yet when the application was made, 'Aina Le'a's planner at the time, Sidney Fuke, told the Planning Department that it was not at all a residential subdivision. At the time, Fuke was seeking the department's permission to subdivide before traffic improvements with Queen Ka'ahumanu Highway had been completed. Another condition (Condition O) of the rezoning ordinance is that intersection improvements needed to be made, including a channelized intersection, to the satisfaction of the state Department of Transportation, before any residential subdivision could be given final approval.

With no improvements having been carried out at that time (or since, for that matter), Fuke argued that the subdivision he was applying for was not a residential one. "While the aforementioned condition requires the channelized intersection be completed prior to final subdivision approval," Fuke wrote, "the proposed affordable multiple-family residential project is not a residential subdivision."

Referring to Fuke's own statement, Kanuha disputed Okamoto's claim of compliance with the "final residential subdivision" approval. Neither the 2009 subdivision nor another one Okamoto referred to (another bulk lot subdivision carried out in 2012, beyond the compliance deadline) is a "residential subdivision," he wrote, "since they did not create individual residential lots."

Kanuha also pointed out several additional compliance issues, including that for

a park plan, historic site protection, public school site, and wastewater treatment.

None of these is as critical to 'Aina Le'a's plans as Condition C, however. Noting that the Planning Department had already given 'Aina Le'a an administrative time extension (which expired more than six years ago), Kanuha informed Okamoto that his client "will need to request a time extension for this condition from the County Council before the Planning Department can issue future approvals based on the zoning ordinance."

The ordinance also gives Kanuha instructions to rezone the property "should any of the conditions not be met or substantially complied with in a timely fashion." In that event, the planning director "shall initiate rezoning of the area to its original or more appropriate designation."

In early March, Okamoto replied to Kanuha. First, he restated his contention that the 2009 consolidation-and-subdivision fulfilled the condition. Second he argued that there is no definition of "residential subdivision" in the zoning ordinance.

Okamoto also referred to past correspondence with former planning director Virginia Goldstein, in which, he claimed, "there is a consistent thread of understanding – none of which was refuted by your office – that creation of the affordable multiple-family residential lot would have fulfilled Condition C. ... 'Aina Le'a, Inc., relied on that in obtaining more than \$20,000,000.00 to start the project. Accordingly, we respectfully request your reconsideration of your preliminary conclusion that Condition C has not been complied with."

As *Environment Hawai'i* went to press, the Planning Department was preparing a response to Okamoto.

A Free Writing Prospectus: To read through the latest "free writing" prospectus published by 'Aina Le'a, one would never know that the company was facing challenges to its ability to develop the land it owns.

There are factual errors. Neither the Hilo nor the Kona airport has international flights at the moment, although both have "international" in their names. A list of "major luxury resorts" within five miles of 'Aina Le'a includes the Four Seasons, which is around 30 miles as the crow flies. The company does not own all 1,099 acres in the Urban part of the project; Bridge retains ownership of the 27 acres where the commercial and medical centers are proposed.

Then there are the “forward-looking statements.” In agate type, these are further described as statements that “relate to a variety of matters, including but not limited to: the operations of the business of ‘Aina Le‘a; the Company’s plans, objectives, expectations and intentions; and other statements that are not historical fact. ... It is uncertain whether any of the events anticipated by the forward-looking statements will transpire or occur.”

Among these must be included the statement that “70 luxury view builder’s lots (parcel U) are in construction available by September 2016.” As of mid-March, the county Planning Department had not received any subdivision request for a 70-lot development. Although no “parcel U” is described in the prospectus, there is a 24-acre lot called out as “Existing Residential – U” in a master plan map included in the draft EIS preparation notice.

The prospectus also describes a 48-unit “luxury townhouse” development called Whale’s Point. “Poised on an elevated plateau that meets with a cliffs sweeping towards the Pacific Ocean, the view from the Whales [sic] Point is nothing less than picture perfect,” the prospectus states. “Contemporary living design seamlessly integrates with cultural richness and a tradition of a total destination experience that is serene, sensual, and surprisingly different.”

Whale’s Point, it goes on to say, is “part of an EB5 funded project within the development.” This refers to a federal program intended to reward foreign nationals who invest in depressed areas with an expedited

path to permanent residency and citizenship. Typical EB-5 projects require between \$500,000 and \$1 million to be invested in businesses or commercial ventures that will support at least 10 new jobs in a given area. Luxury housing is not usually an approved investment for prospective EB-5 investors. However, with most EB-5 projects being managed by third parties who operate so-called regional centers, finding out which projects have qualified EB-5 investors in a given area is difficult. Hawai‘i has 13 such federally approved regional centers, including the Department of Business, Economic Development, and Tourism.

Phase I of the project is said to include the “local workforce” housing, the 70-lot “Ho‘olei” subdivision, and the Whale’s Point development, totaling 502 units. This phase “is currently and active ongoing construction” — which comes as news to the Planning Department.

The company, the prospectus states, is seeking “strategic investors to join us in a joint venture for Phase II ... approved for 1,731 units of luxury villas, single family homes, and golf lodges.” Phase III is development of “business center, including shopping malls and medical centers, etc.” on the 27-acre commercial site, which ‘Aina Le‘a still does not own.

The Supplemental EIS: A court challenge to the original EIS, brought by the Mauna Lani Resort Association, claimed that by looking only at the development planned for the 1,092 acres of land in the Urban district and not considering development proposed for the 2,000 acres in Ag

land surrounding it on three sides, the developer was improperly attempting to segment the project. The judge hearing the case agreed. Now, to move forward with developing the land, a supplemental EIS needs to be prepared. (‘Aina Le‘a had development rights to the Urban land at the time, and it has acquired almost all of that acreage. Former owner Bridge ‘Aina Le‘a continues to own the surround-

ing Agricultural land.)

Even assuming that the new EIS is swiftly approved, given the provisions in the environmental review process set forth in Chapter 343, Hawai‘i Revised Statutes, there is little chance work could resume on the site before the beginning of next year. First, the preparation notice needs to be announced in the Environmental Notice published by the state Office of Environmental Quality Control. The public may submit comments on this for 30 days. After a draft EIS is prepared and notice published, the public has 45 days in which to submit comments. When the final document is available, anyone who believes it is inadequate has 60 days in which to challenge it in court. The public comment and challenge periods alone take up nearly half a year. Preparing the draft and final documents, which need to address comments received from agencies and the public, takes at least several additional weeks.

James Leonard, the consultant preparing the environmental documentation for ‘Aina Le‘a, submitted a draft supplemental EIS preparation notice to the county Planning Department last December, which, as of mid-March, was still undergoing internal review at the department.

As described in that draft, the project now consists of 2,412 residential units or house lots in the Urban area (including 385 so-called “affordable housing” units going up in the southeastern corner), an 18-hole golf course, a 40-unit hotel, and a 27-acre commercial area.

Leonard’s description of development proposed for the Agricultural area includes two 18-hole golf courses and 863 residential lots. While that is scaled back somewhat from the total of six golf courses that were part of the development when it was proposed for LUC approval, in March, the Hawai‘i County Leeward Planning Commission revoked the use permit it had granted for all six golf courses in the early 1990s. In recommending this action, planning director Kanuha cited the failure of the developer to comply with the permit’s time limits as well as the a state law that has banned new construction of golf courses in the state Agricultural district. Golf courses are still a permitted use within the Urban district, however, so ‘Aina Le‘a is able to apply for the golf course it now wants to include as part of the Urban land development. — *Patricia Tummons*



AINA LE'A INC.

A depiction of the luxury townhouses planned for the Whale’s Point development part of the Villages of ‘Aina Le‘a.

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mospheric Administration's Pacific Islands Fisheries Science Center (PIFSC), outlined disruptions to the ocean that are certain to affect populations of fish that are the bread-and-butter of the Hawai'i longline fleet: the top ocean predators including bigeye tuna and billfish.

Woodworth, along with Jeff Polovina, also with the PIFSC, and Jeff Drazen, with the University of Hawai'i at Manoa School of Ocean and Earth Science and Technology, looked at 11 different climate models. All were in strong agreement that in coming decades, ocean temperature would rise, zooplankton would decline, and that, by the end of this century, the carrying capacity for large fish in the North Pacific ecosystem would suffer a reduction of between 20 percent and 50 percent.

"As the ocean gets warmer, fish need to eat more," Woodworth-Jefcoats said at an AGU news briefing. "But at the same time, zooplankton densities are lower. These are the foundation of the food web. So even as the fish need more food, there is less available for them to eat."

That, she continued, means that "fish won't be able to grow as big, there will be fewer fish, or, most likely, some combination of these two impacts.

In addition to species declines, some species may not survive at all. Woodworth-Jefcoats and her colleagues determined that in parts of the subtropical North Pacific, the ocean temperature may rise to levels higher than what some fish are able to tolerate. "These waters may see a loss of up to three or four tuna and billfish species, out of a total of roughly 20 species."

The spatial distribution of tunas and billfish is likely to change as well, moving northward.

"Species prefer specific temperature ranges," she said. "When temperatures change, fish will relocate to stay within their preferred conditions. When the tropics get too warm, some species will leave these waters."

The projected decline of between two and five percent per decade "can have a large impact on the composition and magnitude of catches," she said. "Some fishers who used to home-port in Honolulu have already moved to San Francisco."

The subtropics — where the Hawai'i-based fleet now spends most of its effort — will be hardest hit, Woodworth-Jefcoats added. "The area just won't support as many commercially valuable fish."

This study echoes some of the findings of

one published by *Progress in Oceanography* in 2010 by several scientists, including John Sibert and John Hampton of the Western Pacific Fishery Management Council's Scientific and Statistical Committee. That study, which modeled climate change impacts to Pacific bigeye tuna, found that habitat in the Eastern Pacific improved over the coming decades, while that in the Western Pacific, where the Hawai'i longline fleet catches most of its bigeye, "becomes too warm for bigeye tuna spawning" and "natural mortality of older stages increased due to lower habitat values (too warm surface temperatures, decreasing oxygen concentration in the sub-surface and less food). This increased mortality and the displacement of surviving fish to the eastern region led to stable then declining adult biomass at the end of the century," an abstract for the study states.



That Sinking Feeling: The Future of Reefs

Now we can all have a group cry." Jessica Carilli, the moderator of a panel on coral reefs, made the comment only half in jest following a talk by Oberlin University professor Dennis Hubbard on the future of reefs.

Hubbard, who has studied reefs around the world for the last four decades, gave his audience of scientists concerned with reef health little hope that the subject of their life's work would be around as living structures for much longer.

Most of Hubbard's colleagues on a panel at the Ocean Sciences meeting that discussed coral health had focused on the ability of stony corals to thrive in acidic oceans with limited supplies of reef-building calcium.

Talk of pH levels and aragonite (calcium carbonate) saturation dominated the discussion.

Until Hubbard came along.

What he focused on was a very basic question: Will reefs and reef islands be able to keep up with sea level rise in coming years? Put another way, how fast is sea level rising, and can reefs grow fast enough to keep pace?

To answer the question, Hubbard compared reef-building rates in the early Holocene period to the rates of coral growth he has been measuring since 1979 from 64 different sites scattered around the world.

In the early Holocene, from about 12,000 years ago to 7,000 years ago, glaciers melted and sea levels rose dramatically. Rates of sea level increase span a range, depending on

what period is at issue and what evidence is considered. Still, sea levels rose fast enough to drown most coral reefs. Back then, "fifty-one percent of reefs were unable to keep up with sea level rise," Hubbard said.

Today, reefs may face a similar fate.

At Cane Bay in the Virgin Islands, for example, the rate at which the reef is growing has declined 26 percent since 1979, he said.

If that were not bad enough, he continued, the "export rate" — the rate at which reefs experience the loss of reef-building materials to bioerosion (coral-munching fish and sponges), mining, normal flushing, and hurricanes, among other things — was accelerating.

Compounding the problem for reefs is the rapidly rising sea level.

"Before we were doing anything," he said, "the rate of reef accretion was already building slower than sea level is rising now."

With the predicted increase in storm severity and frequency associated with climate change, reefs may not stand a chance.

Hubbard again referred back to Cane Bay, hit hard by Hurricane Hugo in 1989. The volume of sediment that was removed from the reef area and flushed to deeper water was orders of magnitude greater, in that one event, than what would be washed out in the course of a normal day. With increased storm strength and frequency predicted to occur with climate change, nearshore areas will be hit even harder.

"If you increase storm frequency by just five percent," he said, "twenty to 70 percent of the sediment will be taken out of the reef."

All this is bad news for the terrestrial areas that have been protected in the past from the worst of the waves. If the water over the reefs increases by just 2 centimeters, "you'll allow 15 percent more energy to hit the coast. It's a dramatically more unstable system," he said.

Rising seas will eventually encroach into now-populated areas, but well before that happens, changes in the nearshore environment will have already forced people living in those areas to flee, he said.

The higher storm surges associated with lost reefs "will ruin islands' water supplies," he said. "Islands will be uninhabitable long before they're under water."



El Niño Linked To Coastal Erosion

Predictions of an increasingly frequent, and increasingly strong, El Niño-



DOLAN EVERSOLE

These Sunset Beach houses, on O'ahu's North Shore, were subject to erosion from high waves in October 2013, which was not an El Niño year. In years when El Niño is strong, erosive forces are likely to be just as great or greater.

Southern Oscillation (ENSO) aren't all bad for Hawai'i. Conditions for the Eddie Aikau surf tournament might occur a lot more often in coming years than in the past.

But there's a down side as well. As O'ahu's coastal highways crumble into the sea, driving to the North Shore to view the contest will be a challenge.

Patrick Barnard of the U.S. Geological Survey in Santa Cruz, California, has been studying what happens to coasts in years with a strong El Niño, and the news is not good.

"Coastal flooding from sea-level rise alone could displace around 200 million people by 2100," Barnard said in his talk at the Ocean Sciences meeting. But local impacts are not well understood, and impacts will vary among regions, he noted.

In an effort to better understand ways in which ocean climate variability is linked to coastal change, Barnard looked at data from 1979 to 2012 gathered from four dozen beaches around the Pacific basin as well as in its center (Hawai'i) to determine which coastal areas might be most vulnerable to erosion. He then correlated the El Niño events with eroding coastlines.

Among other things, he found that in winter months — December, January, and February — when a strong El Niño is present, shoreline erosion in Hawai'i increases 67 percent over non-ENSO years. In California, the rate is nearly double that: 129 percent.

The future is almost certain to be worse, with more frequent and extreme El Niños predicted to occur.

"If the frequency of extreme ENSO

events increases," he said, "then populated regions on opposite sides of the Pacific will be alternately exposed to extreme coastal erosion and flooding, independent of sea level rise."

"Right now, sea-surface temperatures are at historic highs. Sea level is at historic highs, and extreme wave energy is 45 percent above normal," he said.



Next Hurricane Season Will Be 'Particularly Intense'

Even in years when El Niño is absent, it still packs a punch — in the form of strong hurricanes. Julien Boucharel, formerly with the University of Hawai'i School of Ocean and Earth Science and Technology (SOEST) and now at the Climate Change Research Center in the University of New South Wales in Sydney, described his work linking hurricane activity to the El Niño cycle.

"The Eastern Pacific is the second most active region in terms of tropical cyclones," Boucharel said, adding that the last two seasons "have been the most intense on record, especially in the vicinity of Hawai'i." And, if his predictions are correct, hurricane activity in the region in 2016 may match or exceed last year's.

To explain this, Boucharel and colleagues looked at the effects of El Niño not on sea surface temperature, but on the temperature of water at depths of up to 100 meters. There they found a mechanism that helps predict just how intense cyclone activity will be in

the Eastern Pacific.

In El Niño years, characterized by warmer than usual temperatures, equatorial water up to 100 meters deep heats up. As these currents of warmer deep water reach the Eastern Pacific, they rise up in the water column, fueling hurricane activity.

By tracking these waves as they move from the Central Pacific to the American coasts, researchers can better forecast hurricane activity, Boucharel said.

For 2016, "we can expect a very strong season in the Eastern Pacific. The next season is going to be particularly intense," he said, although just how intense will depend on atmospheric conditions in the next month or two. "We will wait for March to see atmospheric variability," he added.



Hazard Mapping For Hurricanes

NING Li, a researcher with the UH School of Ocean and Earth Science and Technology's Pacific Islands Ocean Observing System, described modeling that she has done to estimate just how far inland storm surges associated with hurricanes will reach by the century's end.

By then, under what is regarded as the most likely climate-change model, the sea level will be anywhere from 0.4 meters to 0.8 meters (roughly a foot and a half to three feet) higher than it now is. In her modeling scenarios, Li used a figure of 0.6 meters, around two feet.

In the "most critical hurricane event," Li said, a Category 5 hurricane approaches O'ahu from the south. By the time it reaches the island, she continued, it will probably have weakened to a Category 3, but at the same time, wave heights, estimated at 10 feet while the storm is at sea, will have increased as they run into the island's steep underwater slopes. The high waves will damage buildings and roads along the coast, but the actual peak of storm surge, when storm water runs far inland, will come later, as longer-period waves reach the coast. On O'ahu's south-facing shore, areas from Diamond Head to Kapolei are predicted to be inundated by the storm surge. Mapunapuna is completely under water and the airport is flooded, as are Kaka'ako and Waikiki.

The "second most critical hurricane event" involves a storm approaching from the southwest, with the maximum wave height and surge occurring at the same time. The effect on land is, however, much the same.

— P.T.

Wespac from page 1

(WCPFC), was exceeded. Although the quota was nominally 3,554 metric tons, it was lowered to 3,502 mt to reflect actual catches above the quota the previous year, 2014.

Once that's determined, the agency will publish the adjusted 2016 quota and develop a rule package specifying bigeye tuna quotas for the territories and allowing for quota transfers to the Hawai'i fleet.

Depending on the pace of fishing and rule-making, vessels may again be faced with having to return to port because they've hit the quota before quota-transfer rules are ready. Not only does NMFS need to make sure the rules comply with the Endangered Species Act and National Environmental

“We'd like steady fishing here without market interruption. ... That's the goal moving forward.”

— Mike Goto, Wespac

Policy Act, but agreements between the Hawai'i fleet and the territories also need to be finalized before any quota transfer is complete.

“There is a similar amount of uncertainty of exactly when we'll get those rules out” this year, NMFS Pacific Islands Regional Office administrator Mike Tosatto told the council last month.

Last year, the fleet needed all 1,000 metric tons transferred from the CNMI and, according to preliminary data, a portion of the Guam quota as well.

“Obviously, we can't emphasize enough the need to avoid the gap. I think we all saw what the ramifications were — a displacement of a large part of the fleet,” said council member Mike Goto, who is also manager of the Honolulu fish auction. He suggested that 2015, which saw record landings of bigeye, might be the start of a new normal of high-volume catches.

“We'd like steady fishing here without market interruption. ... That's the goal moving forward,” he said.

The council as a whole echoed his sentiments and urged NMFS “not to repeat the non-seamless administrative rule-making process experienced in 2015” and to expedite the 2016 specification package.



Spatial Management

Next year, the WCPFC catch limit for the U.S. longline fleet (which

is mostly made up of Hawai'i vessels) drops to 3,345 metric tons. After that, the organization's present Conservation and Management Measure (CMM) for tropical tunas expires. Rather than continuing the current management scheme, in which member nations are assigned longline catch limits based on a percentage reduction of historical catches, Wespac staff and advisers have argued that conservation of bigeye in the Western and Central Pacific Ocean (WCPO) could be better achieved by reducing effort where the stock is being most heavily impacted. And those areas are nowhere near Hawai'i

That being the case, the Hawai'i fleet's catch limits could be raised significantly under such a management scheme, which Wespac staffers clearly hope would be ad-

opted by WCPFC at its 2017 meeting.

On the last day of last year's WCPFC's meeting, the U.S. delegation expressed its desire to have the commission's science contractor, the Secretariat for the Pacific Community (SPC), investigate spatial management options. Although the European Union voiced its support for the recommendation, the commission ultimately did not incorporate such a study into the SPC's work plan.

At Wespac's Scientific and Statistical Committee (SSC) meeting last month, council executive director Kitty Simonds asked committee member John Hampton, who is also a member of the SPC, how the United States could get the SPC to begin such a study.

“It's up to the secretariat to include these things or not,” Hampton replied, adding

“Let's try and be conservation-minded here.”

— John Sibert, fishery scientist

that it “cannot base what we do ... on interventions across the floor. It would be chaos.” (At the meetings of the WCPFC, statements from delegates during plenary sessions are described as interventions.)

The SPC would also need funding to do the study, he continued.

“Our budget is predicted to be static for the coming years,” he said. Even if a funding commitment was made and a contract developed soon, Hampton said he doubted the SPC would be able to do much before WCPFC's scientific committee meets in

August, when it would likely discuss the research plans for 2017.



Looking Eastward

At the same time Wespac is seeking ways to raise bigeye tuna catch limits in the Western and Central Pacific, it's also looking eastward. Although the vast majority of bigeye caught by the Hawai'i longliners is taken in the region governed by WCPFC, the vessels can also fish in the Eastern Pacific. However, in the Eastern Pacific Ocean (EPO), managed by the Inter-American Tropical Tuna Commission (IATTC), U.S. vessels longer than 24 meters are limited to a total catch of 500 mt of bigeye.

Twenty-three percent of the U.S. longline vessels based in Hawai'i are larger than 24 meters. Last November, NMFS closed the fishery off to those larger vessels when it determined that the 500 mt limit had been reached.

To help ensure as many Hawai'i vessels as possible can continue fishing for bigeye, Wespac staff last month proposed that the council consider recommending that the IATTC amend its limits on U.S. longliners.

At the council's SSC meeting last month, Wespac senior scientist Paul Dalzell pointed out that for the past few years in the EPO, bigeye have not been considered overfished or subject to overfishing, unlike in the Western and Central Pacific, where overfishing is occurring and data suggest the stock is likely overfished.

He noted that bigeye catches in the Eastern Pacific peaked in 2001 and have since declined. What's more, Asian fleets fishing in the region have been catching far fewer bigeye than is allowed under IATTC catch limits.

Only 63 percent of the Asian limits were caught in 2014, he noted. In contrast, the United States has invested heavily in the Eastern Pacific, he added, and the bigeye fishery has “really has taken off.” U.S. longliners now catch about 3,000 metric tons of bigeye in that region.

Because the IATTC's bigeye conservation measure expires this year, Dalzell said there's an opportunity for the United States to have its catch limits amended. Some potential options are: 1) increase the catch limit for large U.S. longliners; 2) establish a new

catch limit for all U.S. vessels, regardless of size; 3) retain the current quotas, but allow for transfers; 4) establish a total allowable bigeye catch for all fleets in the EPO; or 4) implement a spatial management scheme.

Given that the bigeye stock in the Eastern Pacific was subject to overfishing not long ago and is under serious pressure in the WCPO, some SSC members seemed hesitant to raise the U.S. catch limits in the region.

"I have a little trouble understanding how increasing catch limits is a conservation measure," said committee member John Sibert, a fishery scientist. "If the U.S. is going to make a bid for a higher catch limit, it should be in the context of decreasing total catch limits so it appears to be supporting the conservation of bigeye rather than increasing the exploitation rate."

Dalzell tried to justify the proposals by pointing out that the bigeye population in the Eastern Pacific is in a "happier place" than in the Western Pacific.

"Let's exploit it some more, then!" Sibert said sarcastically. He later added that he would be happy to increase the U.S. quota so long as it's done in the context of keeping the total catch low.

"Let's try and be conservation-minded here," he said.

Committee member John Hampton also pointed out that the IATTC has different conservation targets for bigeye than the WCPFC. If the IATTC employed the stock status evaluation method used by the WCPFC, bigeye stocks in the Eastern Pacific would be in the same dire state as those in the Western Pacific, he said.

"I wouldn't be getting excited about huge exploitation potential," Hampton said of Dalzell's assessment of the Eastern Pacific stock.

Dalzell said his agency wasn't seeking a large expansion of bigeye catch limits in the Eastern Pacific, but rather wanted to find a way to keep big boats from having to tie up when they reach 500 mt.

"This is the new reality. The EPO has become extremely important to this fishery. Can we get a number that reflects that? At the same time, I agree, we shouldn't compromise stock conservation," he said.

At the Wespac's full meeting, Dalzell suggested a 5,000 mt limit in the EPO might be something the United States could shoot for.

In the end, the council voted to direct its staff to work with NMFS and the IATTC to "evaluate impacts of management options that could provide relief to Hawai'i longliners while not resulting in overfishing."



Monument Expansion

In addition to seeking ways to increase bigeye tuna catch limits imposed by the WCPFC and IATTC, Wespac is also hoping to keep open fishing grounds around the Northwestern Hawaiian Islands (NWHI) that a group of native Hawaiians — including Office of Hawaiian Affairs director Kamanao Pono Crabbe, Department of Hawaiian Home Lands assistant director William Aila, and noted Hawaiian navigator Nainoa Thompson — proposed in January to become part of the Papahānaumokuākea Marine National Monument.

"Rational arguments have difficulty in an emotional, irrational environment." — Ed Ebisui, Wespac chair

In their January 19 letter to President Barack Obama, they wrote, "While the current boundary of Papahānaumokuākea includes vital habitat for a number of species, it does not fully protect habitat and travel routes for several species including Hawaiian monk seals, green sea turtles, sharks, whales, black-footed and Laysan albatrosses as well as other species. Additionally, large, fully protected marine reserves and sanctuaries are more resilient to climate change and therefore have emerged as important to mitigating the impacts of our warming planet."

At the council's meeting, staffer Eric Kingma argued that there is no science supporting the idea that such an expansion would have a conservation benefit. He also noted that Hawai'i already has 22 times more marine protected areas than any other state

in the union. What's more, he estimated that expanding the monument's boundaries to encompass the entire U.S. exclusive economic zone (EEZ) — which extends 200 miles from shore — could cost the Hawai'i longliners that fish up there about \$10 million a year.

According to logbooks, 82 of Hawai'i's 144 longline vessels fished in the Northwestern Hawaiian Islands EEZ last year, with the most commonly caught species being bigeye tuna.

After Kingma's presentation, council member McGrew Rice said that if monument is expanded and the Hawai'i longliners lose access to \$10 million worth of fish, "we just give that \$10 million to the Asian countries, because we're going to import their fish

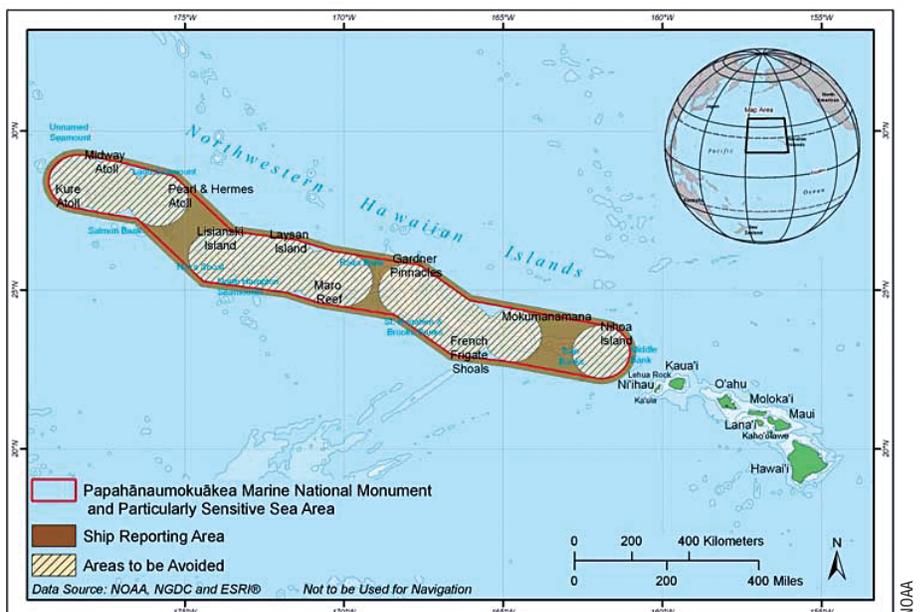
[and] get 'tailpipe' tuna." ("Tailpipe tuna" is a term coined by the council to describe tuna that has been treated with carbon monoxide; the treatment enhances the color of the fish and gives buyers the impression it is fresher than it actually is.)

Council chair Ed Ebisui echoed Kingma's assertion that the expansion proposal was not based on science.

"We're science based," he said. "Rational arguments have difficulty in an emotional, irrational environment."

The council ultimately voted to have staff write a letter to the president to explain the "lack of conservation benefit" and the negative impacts an expansion would have on the Hawai'i fishery specifically and the U.S. seafood market more generally.

— Teresa Dawson



Water Commission Chair Reopens Case On Interim Stream Flows in East Maui

On March 10, contrary to a request from the Native Hawaiian Legal Corporation (NHLC) for immediate action on its petitions to amend the interim instream flow standards (IIFS) of about two dozen East Maui streams, Commission on Water Resource Management chair Suzanne Case ordered the reopening of the contested case hearing stemming from those petitions.

Hearing officer Lawrence Miike had concluded the hearing last April and issued his proposed findings of fact, conclusions of law, and decision and order on January 15. His report came out a little more than a week after Alexander & Baldwin, Inc., announced that its subsidiary, Hawaiian Commercial and Sugar, Co. — the main user of the more 100 million gallons a day (mgd) of stream water diverted from East to Central Maui — would be harvesting its final sugarcane crop this year and that the lands would be used instead for diversified agriculture.

Miike proposed that the Water Commission restore between 18 mgd and 18.6 mgd to some of the streams to meet the needs of East Maui ecosystems and residents with appurtenant and riparian rights. He found that about 182 mgd of the plantation's demand — 140 mgd for sugarcane, 6.7 mgd for industrial uses of HC&S, and 35 mgd in irrigation system losses — was reasonable. However, he also found that the draw on East Maui streams could be reduced if A&B supplemented its water demand with 83.3 mgd from its brackish wells. That would result in about 105 mgd from East Maui streams still needed to irrigate the company's 36,000 acres of cane fields in Central Maui.

Although Miike's recommendations were based on now-outdated assumptions about HC&S's water needs, NHLC attor-

neys on them "has harmed aquatic life as well as petitioners' ability to engage in their traditional and customary practices." They added that a decision in a parallel case before the Board of Land and Natural Resources on a long-term lease request by A&B to continue the stream diversion has likewise been delayed pending resolution of the IIFS amendments.

"The Commission will have the opportunity to address the changed circumstances at a later date, as will all interested parties. Delaying a decision on the current record to address changed circumstances, however,

"We don't have a firm road map."

— Chris Benjamin, A&B president

only prolongs the harm to the resource and the prejudice suffered by petitioners," they wrote.

Case, however, seemed to want the Water Commission to base its decision on a more current record. As attorney Issac Hall argued in his exceptions to Miike's report, HC&S, A&B, and its subsidiary, the East Maui Irrigation Company, may not "lawfully reserve, assign or transfer any of the water arising on state lands or any of the allocations of water deemed reasonable and beneficial in this report to other parties whose particular uses and needs have not been fully analyzed in the report."

Although Case left it up to Miike to decide what additional evidence should be submitted, she stated that it should ultimately lead to a rebalancing of instream versus non-instream uses and a reassessment of the proposed IIFS amendments.

The reopening of the contested case pushes a Water Commission decision on the matter closer to the end of the year,

"We are looking at a several-months-long process as the best."

— Camille Kalama, NHLC

neys Summer Sylva and Camille Kalama requested in their February 29 exceptions that the Water Commission decide the case "expeditiously on the current record."

They noted that their clients, taro farmers and cultural practitioners from East Maui, filed their petitions more than 15 years ago and that the delay in rendering a decision

when HC&S will be completing its final harvest, NHLC attorney Kalama said at a March 21 state Senate Committee on Water, Land and Agriculture hearing on a bill (HB2501) relating to the authority under which A&B may continue diverting the streams pending the issuance of a long-term lease.

"We are looking at a several-months-long process as the best," she said of the reopened contested case. No new hearing dates or filing deadlines had been announced by press time.

The longer it takes for the Water Commission to make a final decision on the IIFS, the longer it will take Alexander & Baldwin to complete the environmental impact statement (EIS) necessary for the long-term water lease it requested from the Land Board in 2001. Without an EIS, the Land Board cannot put such a lease up for public auction. NHLC attorneys have suggested at public hearings that its clients might consider bidding on the lease, as well, to ensure the streams are restored.

Balancing Act

With the reopening of the contested case

hearing, Miike is now free to base his recommendations on the fact that HC&S will need significantly less water for its final sugarcane crop this year, which, according to statements by A&B, will only cover about 16,000-17,000 acres. Miike has already stated in his recommendations that HC&S's brackish wells could safely supply enough water to irrigate an area that large.

As of a few weeks ago, the company was unable to give state legislators many details about what diversified crops will be grown after the sugar plantation is closed.

"We don't have a firm road map," A&B president and CEO Chris Benjamin told the Senate committee last month. "We envision biofuel crops as a big part, irrigated pastures, food crops, and new crops such as industrial hemp," he said, estimating that the company's long-term water needs will be 135-155 mgd.

In its exceptions to Miike's recommendations, HC&S stated that the only scenario that would require the same amounts of water as sugarcane would be the farming of tropical grasses or cane for biofuel across all 36,000 acres.

Benjamin testified to the committee that HC&S's brackish water wells may be too salty to serve as an alternative water supply, especially for a crop such as hemp. (At present, the company does use about 70 mgd from those wells, he said.)

"We realize diversified ag will be a challenge. We want to give it the best chance we can," he said.

With regard to short-term water needs, Benjamin said that HC&S's final sugarcane crop

will require 95 mgd and that the company will need 45 mgd after its harvest to irrigate cover and trial crops.

How Miike will factor HC&S's and A&B's current and future water needs into his revised IIFS recommendations remains to be seen. In their exceptions to his recommendations, attorneys for the Maui Tomorrow Foundation (MTF), Na Moku Aupuni o Ko'olau Hui, Lurlyn Scott, and Sanford Kekahuna argued that he has already taken a backwards approach to setting the IIFS and has given HC&S's needs far too much weight.

Attorney Hall, representing MTF, pointed out that the Hawai'i Supreme Court, most recently in its 2014 decision on the Kaua'i Springs case, has ruled that a "fundamental principle of the public trust doctrine precludes assertion of prior uses or vested rights to use water to the detriment of public trust purposes."

"The required starting point is, therefore, 27 undiverted, free-flowing streams," Hall argued.

Kalama and Sylva of the NHLC further asserted that Miike's proposed decision "erroneously assumes that previously diverted streams are a foregone conclusion. That assumption informed the hearing officer's effort to accommodate HC&S's water needs as an offstream, out-of-watershed user and to term it 'balancing.'"

And Miike's final recommendations were far from balanced, they claimed. In his report, he proposes restoring up to 18.6 mgd to 23 of the 27 petitioned streams. That amount, Sylva and Kalama stated, would: 1) leave streams with as little as five percent and at most 64 percent of flows necessary to support minimum stream habitat requirements; and 2) satisfy only 43 to 50 percent of their clients' water needs for taro, despite the fact that they have no alternative water source.

In contrast, they continued, the proposed amended IIFS would make 96 to 149 mgd available to satisfy what Miike found to be HC&S's 105.6 mgd reasonable and beneficial use of diverted water. Thus, the IIFS would meet 91 to 141 percent of the company's water need, they wrote. They also noted that HC&S does have an alternative water source, its brackish groundwater wells, that would ensure that 100 percent of company's water needs are met.

Habitat Needs

In addition to arguing that state law requires that minimum flows must be returned to all streams, the NHLC identifies specific amounts of water — based on the state Division of Aquatic Resource's (DAR) calculations — that should be restored to Puahokamoa, Haipuaena, Palauhulu, and Waikamoi streams.

DAR staff testified during the contested case hearing that to provide adequate habitat for stream fauna, the streams need a minimum flow equivalent to 64 percent of the natural base flow. (That level is often referred to as the H90 level, which is the minimum flow necessary to support 90 percent of the natural habitat in a given stream.)

Using that standard, the NHLC argues in its exceptions that those four streams need at least 9.5 mgd more than what Miike proposed:

- Puahokamoa: Miike recommended leaving the IIFS at the status quo level of 0.26 mgd, 3.49 mgd less than the H90 level of 4.33 mgd, which would require restoration of 3.49 mgd.
- Haipuaena: Miike also recommended leaving the IIFS at the status quo level of 0.06 mgd, less than a third of the 2.13 mgd required to meet H90 level.
- Palauhulu: Miike recommended decreasing the IIFS to 3.56 mgd, which, the NHLC argued, would leave only 1.56 available for the instream habitat after taro irrigation needs were met, "which is far short of the estimated 4.55 mgd required to satisfy the minimum 64 percent median base flow."
- Waikamoi: Although Miike recommended increasing the IIFS, it was 0.9 mgd below H90 the level.

In MTF's exceptions, Hall focused not on the water amounts needed to meet instream

needs, but on how A&B's diversion system hampers the ability of stream organisms to traverse the stream course and diminishes the wildlife, fishery, scenic, aesthetic, recreational, and other uses of the streams, many of which are diverted multiple times.

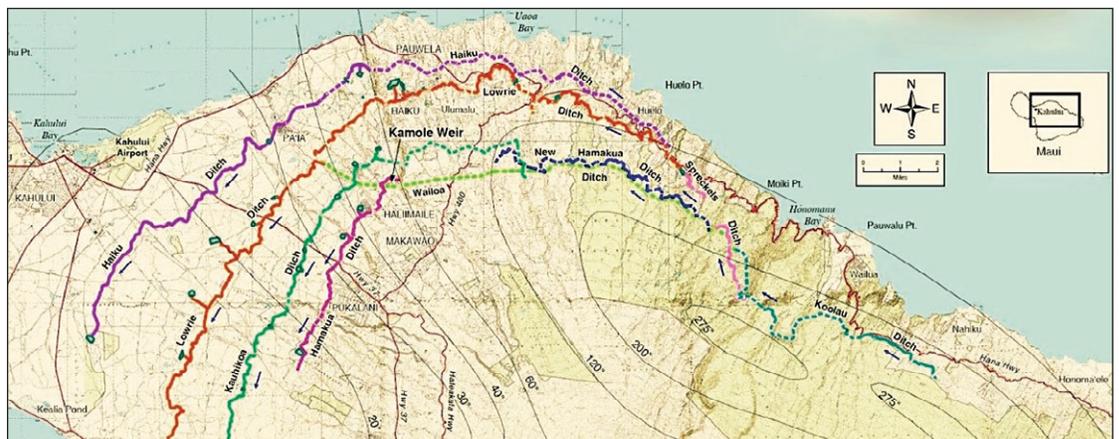
Seven of the 27 streams are each diverted between four and five times, he wrote, adding that such diversions leave segments of streams dry.

"The existence of these dry segments (that only exist because of the diversions) has emboldened some to claim that the streams are not gaining and are, instead, intermittent," he wrote, noting that Water Commission staff refer to them as "artificially intermittent."

"Public trust principles require that the causes of this artificial intermittency — the diversions — be modified to restore the streams to their original gaining nature. Accepting their artificially intermittent status caused wholly by 'prior uses' constituted by the existing diversions has placed in jeopardy or eliminated uses explicitly mandated for protection as public trust purposes," he wrote.

"For streams diverted more than once, the upwards and downwards migration of protected species is not possible," he added. Hall argued that the diversions must be modified to include a "trough style" bypass to allow for migration and that sluice gates, which he said currently do not open wide enough to provide for minimum stream flows, should be enlarged.

Addressing the diversions' impact on scenic, aesthetic, and recreational uses, Hall wrote that one of the greatest losses resulting from the diversion of Honomanu Stream was the dewatering of the "once magnificent" waterfalls found near the 500-meter elevation. He noted that the Sierra Club has led hikes to the area for nearly 20 years and "it has become increasingly difficult to find



East Maui Irrigation system.



Isaac Hall argues that the East Maui Irrigation system's sluice gates, like the ones pictured here, must be enlarged to allow greater stream restoration.



CWPRM

any water visible in these waterfalls, since it is all taken by the EMI diversions.”

“These falls, on public land, are now dry except during heavy rain events when access to the area is not safe,” he continued. “This means that the public is denied the opportunity to enjoy the beauty of a public trust resource located on public land.”

**“The required starting point is
... 27 undiverted, free-flowing streams.”
— Isaac Hall, attorney for MTF**

Human Needs

The NHLC and Hall both slammed the proposed amended IIFS for failing to adequately meet the needs of East Maui residents who have constitutionally protected rights to stream water.

First, the NHLC argued, Miike improperly borrowed the taro water budget used in a similar case in West Maui, known as the Na Wai Eha case. In that instance, the Water Commission determined taro needs 130,000 to 150,000 gallons per acre per day.

Testimony from expert witness Paul Reppun, an O’ahu-based taro farmer, suggested that a more reasonable amount was 100,000 to 300,000 gallons per acre per day, which represented the maximum amount of water needed to keep taro cool at the most critical part of its growth cycle.

Miike, the NHLC stated, chose instead to base the amended IIFS on “an unworkable average that provides the taro crop with only half the water it needs to survive for an extended period of time. ... That calculation is not only ‘backwards’ but clearly erroneous.”

In addition to recommending an increased water budget for taro, the NHLC argued that Miike had improperly failed to include nearly 32 acres of lands in Ke’anae and Wailua that have appurtenant rights to grow taro. When taken into account, those lands would require 2.9 to 8.8 mgd

of water, based on Reppun’s recommended water budget.

MTF’s Hall also claimed that Miike ignored valid water claims by residents of the Hanehoi watershed. With regard to farmers Ernest Schupp, Solomon Lee, and Neola Caveny who together possess lots with appurtenant and/or riparian

rights totaling 6.2 acres, Miike erroneously stated their acreage as 2.3 total acres, Hall argued.

Hall went on to say that Miike also failed to factor into his IIFS the domestic water needs of Hanehoi residents. The licenses, and also the subsequent revocable permits, under which A&B diverts East Maui streams, included clauses protecting the

water rights of native tenants for domestic use, Hall stated.

“There is no evidentiary support for the report’s refusal to allocate the additional water needed for domestic purposes by the Huelo community,” which includes as many as 100 people, he wrote.

The fact that all water not required by the IIFS to remain in the stream would be diverted by EMI’s ditches and not kept in the streams or shared with riparian and appurtenant users “is inconsistent with the public trust doctrine,” he added.

Finally, Hall stressed the need for measures to be put in place to ensure that the amended IIFS are complied with. He cited the fact that neither Schupp nor Caveny received the stream water allocations the Water Commission decided years ago they should get.

“Without these measures, or measures like them, it is likely that the amended IIFS will be illusory once again, no matter how often and how much downstream users complain about the continued violation of their protected rights,” Hall wrote before asking that the commission provide immediate interim relief for Schupp and Caveny by granting them the flows Miike recommended for Hanehoi and Puolua streams.

“The deprivation has been for such a long time that this immediate relief is warranted, even though ... those claiming allocations of water within the Hanehoi watershed were and are entitled to much more water,” he wrote.

— **Teresa Dawson**



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Appeals Court Upholds Decision Sending Lana'i Dispute Back to LUC

In 1991, the state Land Use Commission approved a boundary amendment petition that set the stage for development of luxury resorts on Lana'i. One of the conditions – Condition 10 – that it attached to the approval stated that the developer was not “to utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water ... for golf course irrigation requirements.”

Exactly what was meant by that condition has been the subject of litigation ever since.

Most recently, on March 21, the Intermediate Court of Appeals issued a decision on the subject, upholding a lower court decision in 2012 that found the LUC had improperly decided an issue that had been remanded back to it after another series of court rulings. In that decision, issued in 2010 after a hearing launched in 2006, the LUC approved an order that essentially nullified Condition 10, giving developer Lana'i Resorts, LLC, the ability to draw irrigation water from the island's high-level aquifer.

Lana'i Resorts appealed the lower court's 2012 decision to the Intermediate Court of Appeals, while Lana'ians for Sensible Growth (LSG), the group that had originally asked the LUC to enforce Condition 10, opposed the appeal.

To strengthen its case Lana'i Resorts argued that LSG should not be allowed to intervene in the proceedings, since the original group – Lana'ians for Sensible Growth — had dissolved and then reformed after a hiatus of several years. The ICA rejected that argument, noting that the leadership of both groups was much the same. In any case, while the new group had failed to “officially substitute itself as a party in this litigation,”

under the law, its members who had been involved with the case could “continue their role in the proceedings despite LSG's administrative dissolution.”

After dispensing with the matter of standing, the court turned its attention to the hearing that the LUC held in 2006, following a ruling of the Hawai'i Supreme Court that ordered the LUC to clarify whether Lana'i Resorts had violated Condition 10. Although the high court did not order it to hold a hearing on that question, the LUC decided to do so, and thus the hearings became subject to the statutory requirements of contested cases, the ICA found.

And when held against those contested-case hearing requirements, the LUC's actions were found to be “unlawful,” the ICA determined.

As described in the appellate court's decision, the hearing began with two days of testimony in June 2006 from Lana'i Resorts, Maui County, and the Office of Planning. LSG had witnesses prepared to testify, but before that could happen, the LUC decided to have a hearings officer to continue holding hearings and then make a recommendation to the LUC. “At this hearing, counsel for LSG reminded the LUC that it had heard all parties' testimony at the June 2006 hearing, except for testimony from LSG,” the ICA noted. “I think we would be prejudiced if, in fact, the record stands as it is with everybody else's testimony but not ours on these critical issues,” Native Hawaiian Legal Corporation attorney Alan Murakami

said at the time. The NHLC has represented Lana'ians for Sensible Growth throughout the long litigation over Condition 10.

When the LUC finally voted on the matter, in January 2010, it reversed its earlier, 1996, order and granted Lana'i Resorts motion to modify Condition 10 in a manner that would allow ongoing use of high-level aquifer water for golf course irrigation.

Because the LUC had effectively denied LSG the opportunity to offer testimony, the appellate court upheld the lower court finding:

“The LUC entered its 2010 order based on ‘having reviewed [the OP's] Motion and Revised Motion, [Lana'i Resorts'] Motion, the various pleadings filed by the parties and the record in this proceeding, and having heard public testimony and arguments of counsel for [the OP], [Lana'i Resorts], Maui County, and counsel for LSG,’ noticeably leaving out public testimony for LSG.

“Therefore, we come to the same conclusion as the circuit court: ‘the further hearings LUC conducted ... did not result in LSG being afforded a full and fair opportunity to have its evidence heard and considered... Such a process does not satisfy the appearance of justice.’”

The LUC's 2010 decision is thus vacated, with the ICA agreeing with the 1st Circuit Court that “the LUC's decision was made upon unlawful procedure.” — *P.T.*



Sprinklers water a lawn at one of Lana'i Resort's properties.