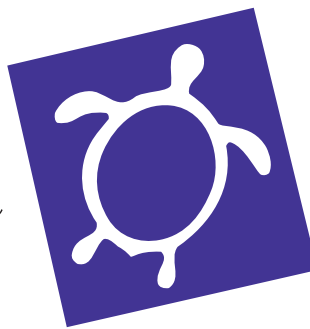


Environment



Hawai‘i

a monthly newsletter

Sharks On the Line

The very image of a shark strikes fear in the hearts of surfers and swimmers around the globe. But when it comes to oceanic whitetip sharks and their interactions with the longline fishery, the predator has become the prey – so much so that the once abundant species has been federally listed as threatened.

Now the government faces the threat of a lawsuit, and the fishery faces the threat of closure, unless swift action is taken to meaningfully reduce those interactions.

And that’s just one of the hurdles the Hawai‘i longline fleet faces. Swordfish boats had hardly left Honolulu harbor before their fishery was shut down last month after reaching the annual limit of loggerhead turtle interactions. And in February, a large swath of fishing grounds south of Hawai‘i was closed after two false killer whales were determined to have been killed or mortally injured by the bigeye tuna fleet in federal waters.

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Guess Who’s Turning 30?

Council Issues Warning to NMFS Director After Lawsuit Threat Over Imperiled Shark

On February 7, the Conservation Council for Hawai‘i and Kona activist Mike Nakachi sent the National Marine Fisheries Service (NMFS) a warning: Fulfill your obligations to protect threatened oceanic whitetip sharks or face a lawsuit that could halt Hawai‘i’s two longline fisheries, as well as the American Samoa longline fishery and the U.S. purse seine fishery in the Western Pacific.

To say the Western Pacific Fishery Management Council is unhappy about that would be an understatement.

In listing the oceanic whitetip shark as threatened in January 2018, NMFS reported that the catch rate for the shark in the Hawai‘i longline fishery – a measure of its relative abundance – had declined by more than 90 percent since 1995. Catch rates throughout the Western and Central Pacific have declined similarly, driven mainly by a high international demand for the sharks’ fins.

Scientists studying the region have determined that fisheries there are killing the sharks at a highly unsustainable rate.

Under the Endangered Species Act,

NMFS’s Office of Sustainable Fisheries is required to consult with the agency’s Office of Protected Resources to determine the potential impacts of the U.S. pelagic fisheries on the sharks and then issue a biological opinion on whether the fisheries are likely to jeopardize the sharks’ continued existence. That opinion would include an incidental take statement authorizing the fisheries to harm or kill of a limited number of sharks and specifying measures to minimize the effects of that take.

In the 60-day notice of intent to sue the service, Earthjustice attorney Christopher Eaton — representing the Conservation Council and Nakachi — argued that by allowing the fisheries to continue before completing consultation, the service is violating the act.

“NMFS may not authorize pelagic fisheries activity until it completes consultation on the fisheries’ effects on the oceanic whitetip shark and ensures its authorization of the fisheries and implementation of the Pelagic FEP [fishery ecosystem plan] will not jeopardize the species,” he wrote.

Continued on Page 4

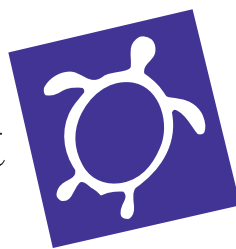


PHOTO: NOAA

The National Marine Fisheries Service listed the oceanic whitetip shark as threatened in January 2018.

Environment

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Hawai'i

April 2019

NEW AND NOTEWORTHY

In Memoriam: Last month the Hawai'i environmental community lost two pillars of conservation: **Don Reeser** and **William Merwin**.



Don Reeser

Don, 80 years old, died March 16 at his home in Makawao, Maui. He probably did more to protect the natural resources of Hawai'i Volcanoes National Park and Haleakala National Park than any other single individual – more, in fact, than any other two or three dozen people. He stood up to hunters and began large-scale fencing projects in both parks to protect their natural resources from goats and other feral animals. He was supervisor at Haleakala for many years and

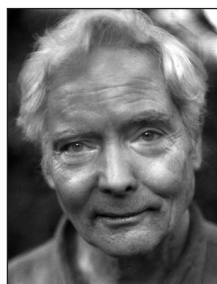
continued even in retirement to be an outspoken proponent of the park through the Friends of Haleakala National Park group, which he helped to found.

Environment Hawai'i board members Valerie Monson and Mary Evanson worked closely with him on many projects. Valerie describes him as a Renaissance man, who in addition to his advocacy for natural resources, also raised bees and played the saxophone.

William Merwin, 91, died at his home in Peahi, Maui, on March 15. He is best known to the world for his luminous poetry.

But his friends in Hawai'i cherished him also for his dedication to conservation, most notably through the Merwin Conservancy, established by William and his gracious wife, Paula, who died in 2017. Both served for many years on the board of directors of *Environment Hawai'i*, and William was the featured guest at two of our fund-raising dinners.

It is hard to put into words what these two have done to advance the cause of conservation in Hawai'i. Our lovely archipelago is poorer for having lost them, but immeasurably richer as a result of their devotion to this place and their efforts on its behalf.



William Merwin

EH-Xtra, EH-Xtra: News doesn't stand still from one monthly deadline to the next. Our EH-Xtra column, appearing on the home page of our website, provides timely updates on stories we've covered as well as news that breaks too late to get into the next month's issue. Go to environment-hawaii.org and check them out.

Over the last few weeks, we've posted EH-Xtra items dealing with the 'Aina Le'a litigation against the state and a proposal to build a whole new town in the middle of pasture lands on the Big Island.

If you'd like to receive notices as new items are posted, and you aren't already receiving them, just send an email to ptummons@gmail.com and we'll add you to the mailing list.

'Aina Le'a Bankruptcy: For three days in March, Honolulu bankruptcy Judge Robert J. Faris heard arguments for and against approving the plan of 'Aina Le'a, Inc., to reorganize and move forward with its plans to develop about 1,000 acres of land near the Kohala Coast of the Big Island.

For all three days, 'Aina Le'a's witnesses, including its CEO, Robert Wessels, were grilled remorselessly by attorneys for the company's largest single creditor, Bridge 'Aina Le'a, LLC.

On March 27, however, 'Aina Le'a and Bridge seem to have ironed out their differences, with Bruce Voss, Bridge's attorney, filing a stipulation with the court that withdrew Bridge's objections to the reorganization plan. In return, 'Aina Le'a agreed to amend its proposed treatment of Bridge's claims, providing now for interest to accrue at 10.2 percent annually on debt of \$20 million. 'Aina Le'a also agreed to repay Bridge more than \$100,000 in Hawai'i County real property taxes that Bridge had paid on the 'Aina Le'a land that secured Bridge's claim.

As of March 28, the other major secured creditor, Romspen Investment Corp., had not yet agreed to 'Aina Le'a's plan. Judge Faris has indicated he will make an oral ruling on whether to confirm the plan on April 8.

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Quote of the Month

*"It's a complex business to work in. ...
There are many rocks to be thrown."*

— Mike Tosatto, NMFS

Swordfish Fishery Closes Early Again After Hitting Loggerhead Catch Limit

The Hawai'i shallow-set longline fishery has struggled lately to slow its catches of endangered loggerhead sea turtles. As a result, it was shut down on March 19, after hitting its annual limit of 17 takes.

This comes a year after a federal court order reduced the take limit from 34 to 17 and forced the fishery — which targets swordfish — to close in May while the National Marine Fisheries Service (NMFS) completed a new biological opinion on the fleet's impacts on loggerhead and leatherback turtles.

The fishery had caught 33 loggerheads before being shut down last year.

NMFS was expected to release a draft biological opinion last October, but that deadline was pushed to January, then later to late-March. As of press time, it still had not been issued, despite a final opinion being slated for completion by the end of this month.

The Biological Opinion (BiOp) Review Advisory Panel, a subset of the Western Pacific Fishery Management Council's Scientific and Statistical Committee, will meet on April 12 to consider the new draft biological opinion, with the full council meeting later that afternoon by teleconference to prepare its recommendations to NMFS.

The population modeling studies of T. Todd Jones of the Pacific Islands Fisheries Science Center play a key role in the BiOp. Jones' modeling predicts that the North Pacific loggerhead population will increase very slightly over time, while the leatherback population will decrease. Currently, the annual cap for leatherbacks is 26.

NMFS staff has estimated that the fishery will likely interact with up to 37 loggerheads and 21 leatherbacks a year, but it's unclear how NMFS will factor in those projected take levels in setting the new hard caps. Last year, the council proposed that NMFS simply set the caps at the estimated take levels without regard to the impact their removal from the turtle populations would have on the species' ability to recover, or even survive.

While the rate at which the fishery caught loggerheads last year was much higher than it has been this year, the fleet this year was catching, on average, about 1.5 of them a week. At that rate, the fishery would still have closed about the same time it did last year, perhaps a few weeks later, had the loggerhead cap been increased to 37.

Impacts

At the council's meeting last month, member Mike Goto lamented the effects this year's closure has had and will have on the fishery.

Many vessels within the fleet didn't have a chance to set gear, he said, and crews that were flown in for this fishery have had to return to port and switch gear so they can pursue bigeye tuna.

While nobody is losing their job because of the closure, Goto said the fishers are losing time. Russell Ito of the Pacific Island Fisheries Science Center told the council's Scientific and Statistical Committee that the fishery had also invested in supplies, such as light sticks and expensive bait, to catch swordfish. Ito also noted that it's a marketing nightmare for the fish auction, which Goto manages, with all of the fleet's swordfish coming into port at once.

What's more, Goto told the council, the market is losing product.

"It's throwing everything back into a chaotic ball, whether it's an area closure or fishery closure," he said, alluding to the closure earlier this year of a large portion of the deep-set longline fleet's fishing ground due to interactions with false killer whales.

Goto later read to the council testimony from Roger Dang, whose family owns more than 20 fishing vessels. Dang had written it while attending a Seafood Show in Boston and stated that he was testifying "on behalf of the entire community of Hawai'i's swordfish fleet and others in the fishing industry, including fish buyers and wholesalers, fishing gear and bait suppliers, and logistics companies."

Dang called the recently announced swordfish fishery closure "highly untimely and unfortunate," especially given that they had spent the last several months working with some of the largest swordfish buyers in the country to "develop a buying and shipping program to support the US/Hawai'i swordfish fishery."

"These buyers initially expressed concerns on the reliability and continuity of supply because of the hard cap being reached in 2018. Still, they committed since the start of the 2019 season and, just as recently as yesterday, agreed to decrease their reliance on foreign imported swordfish and increase their purchases of Hawai'i swordfish," Dang continued.

"The lengthy delay of a biological opinion was critical for us, and we feel the agency has failed us greatly. This has directly caused our mainland U.S. partners to lose confidence in our ability to sustain production, and I fear that they will continue to discount Hawai'i as a reliable source of swordfish going into the future," he wrote.

Consultation Capacity

Council member McGrew Rice asked Mike Tosatto, administrator for NMFS's Pacific Islands Regional Office, how quickly the fishery could be opened once the new biological opinion is completed, noting that the fall is a good time of year to catch swordfish.

Tosatto did not give a specific date, explaining that he was trying not to get too far ahead of "all the 'what ifs.'"

Whenever the opinion is completed, "the market is obviously going to take a hit," Goto said, adding that the Hawai'i fleet provides at least half of the country's domestic swordfish. "This is a very desired fishery. ... It's crucial we gain the support of all parties otherwise we're looking at the dissolution of the shallow-set fishery," he said.

Council member Christinna Lutu-Sanchez asked Tosatto whether his agency needed more staff to complete biological opinions.

"The broadest answer is yes," he replied. He explained that NMFS has long lacked adequate capacity nationwide to process consultations. Consultation hotspots have rotated around the country and at times, the number of outstanding consultations have numbered in the hundreds, he said.

"The administration has asked for more resources. Congress didn't respond to that in exactly the same way. We do expect a modest increase in consultation resources in the regional office. Our science center received no commensurate increases ... to meet the scientific needs," he said.

He added that external factors, including unfortunate time lags to "dot Is and cross Ts," contribute to delays in the consultation process.

Elena Onaga with the National Oceanic and Atmospheric Administration's Office of General Counsel said her office has also been asking for additional staff, but is still able to complete legal reviews fairly quickly and accurately. However, she added, "The scrutiny [required so] that we have a defensible document, that we will not lose on, takes a little more time." — T.D.

Shark from page 1

As of the March meeting of the Western Pacific Fishery Management Council, the service had not yet completed its consultations.

The Numbers

Recognizing the harm fishing was inflicting on oceanic whitetip sharks, the international Western and Central Pacific Fisheries Commission (WCPFC) several years ago passed a measure that requires vessels from participating countries to release any oceanic whitetip shark as soon as possible after it is brought alongside the vessel and “to do so in a manner that results in as little harm to the shark as possible.”

The Inter-American Tropical Tuna Commission (IATTC), which governs pelagic fisheries in the Eastern Pacific Ocean, adopted a similar measure, which requires vessels to promptly release the sharks unharmed, to the extent practicable.

Both measures include provisions intended to prevent the intentional harvest of the sharks. In its own attempt to reduce shark finning, NMFS also published a rule in 2011 prohibiting their retention by pelagic longline fleets.

Despite the federal and international measures, the U.S. pelagic fisheries in the Pacific still catch hundreds or thousands of whitetips, depending on the year.

Earthjustice's Eaton pointed out in his letter to NMFS that the Hawai'i deep-set longline fishery, which primarily targets big-eye tuna, caught an average of 800 oceanic whitetip sharks a year between 2007 and 2016. Last year, the fishery's 140-plus vessels caught 366, and the year before, they caught 335, according to logbook reports.

The Hawai'i shallow-set fishery, which primarily targets swordfish, is a much smaller fishery and catches far fewer whitetips, about a few dozen a year, according to logbook reports. The American Samoa longline fleet, although similarly small, catches a few to several hundred of the sharks a year. Last year, the fishery's 13 vessels caught 311.

Data on how many oceanic whitetips are caught and killed each year by the U.S. Pacific purse seine fishery are scarce, although both international Pacific fishery organizations, WCPFC and the IATTC, require that participating member countries provide that information. Last year, the purse seiners' massive nets were reported to have hauled in 11 whitetips in the Western and Central Pacific, nine of which were dead.

Generally, 25-30 percent of the sharks

are released dead by the longline fisheries, according to data submitted to the regional fishery organizations. While the purse seine fishery seems to catch fewer whitetips, it kills between 80 and 90 percent of them.

How many of the sharks released alive actually survive is unknown, but resource management organizations, such as the IATTC, have acknowledged that post-release mortality is a concern and that the measures they have passed may be insufficient.

'Dilatory Pace'

NMFS is supporting tagging research in waters off Kona to learn as much as possible about the sharks' basic ecology and stock structure, and environmental variables associated with their presence or absence, among other things, according to a blog published by the National Oceanic and Atmospheric Administration.

The agency has also been working for months on consultations for some of the pelagic fisheries in the Western Pacific region. To Western Pacific Fishery Management Council executive director Kitty Simonds, however, the service is moving way too slow.

In delivering her periodic report to the council at its meeting last month, she warned it would be unequivocally bleak. She informed the council of Earthjustice's notice of intent to sue, which included an injunction threat aimed at the Honolulu-based deep-set longline fishery, which she said is the country's seventh-most valuable; the Hawaii shallow-set fishery, which reportedly provides 50 to 60 percent of the domestic swordfish in the United States; and the American Samoa longline and Pacific purse seine fisheries.

“Why? NMFS has failed to do its job,” Simonds said, complaining that the closure threat resulted from the “dilatory pace” with which NMFS's Pacific Islands Regional Office (PIRO) was proceeding with its consultations.

The Earthjustice notice was a response to NMFS not fulfilling its duties and not prioritizing completing the consultation process, she said. As a result, the fisheries are in “great danger,” she said, adding, “I can't emphasize enough the lack of government support.”

Mike Tosatto, administrator for the NMFS's Pacific Islands Regional Office, called Simonds' statement disappointing and stressed that his staff are “nothing but diligent professionals pursuing the work they need to do to protect our protected species ... in partnership with this council.”

“I'll ask all of you and the executive director to stop before we do damage to that partnership,” he added.

Simonds was unmoved: “I'm not talking about the staffs of the region and the [Pacific Islands Fisheries Science] Center. I am talking about the leadership in terms of the urgency to plan their work to also accommodate the council, which has not happened. ... I hope I've not offended the staff. I'm not talking about the staff. I'm talking about leadership.”

“Do we just wait for the lawsuit to come across and some other process starts with the possibility the fisheries start closing? ... What are the possible impacts on fisheries, in particular the American Samoa longline fishery?” asked council member Christinna Lutu-Sanchez, representing American Samoa fishers.

Tosatto said he could not respond to questions about how NMFS intends to respond to the notice of intent to sue. Notices of intent “happen throughout agencies all the time. Sometimes they actually sue. ... From here, we frankly don't have insight into their motivations.”

In the meantime, the fisheries continue to operate, he said. He noted that NMFS was working on reinitiating consultation for the American Samoa longline fishery.

Addressing questions from council members about what NMFS was doing in response to the notice from Earthjustice, National Oceanic and Atmospheric Administration counsel Kristen Johns explained that if a lawsuit were initiated, “we would then react to that lawsuit when it was filed.”

“I imagine the risk could be disastrous for the fisheries, not only for American Samoa, but Hawai'i. That's a big concern, I'm sure you can appreciate. ... I assume they would be asking for an injunction. ... Am I correct?” asked council chair Archie Taotasi Soliai, an executive with the Starkist tuna processing plant in American Samoa.

Johns said the plaintiffs could seek to fully or partially close the fisheries and seek litigation costs.

“That's not disastrous. That's catastrophic,” Soliai said.

Dean Sensui asked if it was the office's priority to complete the shark consultations before completing a long-awaited biological opinion for loggerhead and leatherback sea turtles for the Hawaii shallow-set fishery.

Not necessarily, Tosatto replied.

Council member John Gourley of the Commonwealth of the Northern Mariana Islands asked Tosatto if his office had suf-

Continued to page 5

ficient staff to do four consultations – one for each of the U.S. Western Pacific fisheries that interact with the sharks – at the same time before completing the one that's been ongoing for the sea turtles.

Tosatto replied that his agency was initiating consultations on the fisheries. "It's not an easy or myopic decision to make. It's relatively complex and we're acting as best we can," he said.

Throwing Rocks

Throughout the council's three-day meeting, members lamented the various impediments to fisheries in the region, including litigation over an area closed to longliners in American Samoa, the closure earlier this year of a huge fishing area south of the Main Hawaiian islands due to the deep-set fishery's injury and killing of false killer whales, and — not least — the closure on March 19 of the Hawaii shallow-set fishery due to the taking of 17 endangered loggerhead sea turtles.

At the end of the last day of the council meeting, staff presented a final recommendation that seemed meant to encapsulate the council's general feeling regarding who was to blame for these impediments. Staff started off by recommending that the council request that PIRO complete the shark consultations for the four affected pelagic fisheries by June 1.

"The Council makes this request to ensure the expeditious completion of the consultations to reduce litigation risks associated with the continued operation of these vital fisheries. The Council and its staff are ready to assist NMFS to complete these consultations according to the existing ESA-MSA Integration Agreement," the recommendation read, referring to the Endangered Species Act and the Magnuson Stevens Act, which governs U.S. fisheries.

Then things seemed to turn personal.

"To date, PIRO leadership has not ensured timely completion of ESA consultations for these fisheries as well as MSA fishery actions (e.g., territory bigeye specifications, FEP review, etc.), leaving the Council highly uncertain about its confidence in PIRO leadership to meet statutory deadlines and ensure the sustainability of the region's fisheries as mandated by the MSA," the recommendation continued.

Then came the threat.

"If PIRO leadership cannot ensure completion by the requested deadline, the Council may take a vote at the June Council meeting on whether or not it has confidence in the Regional Administrator to lead NMFS PIRO. The Council directs

staff to notify Chris Oliver, Assistant Administrator for NOAA Fisheries, of this timeline as well as concerns with the lack of timely completion of the ESA consultations for the region's pelagic fisheries," it stated.

Tosatto asked to speak before staff read aloud the proposed — and in his view, offensive — language to the council.

"If it is not your intent to permanently damage the partnership we have, I ask you not to read this and not to go down this path. It's clear, as council members, you do not understand the work that we do," he said, pointing out that he had offered each council member the opportunity to visit with his staff to help them understand what it takes to complete the work it does.

However, he continued, "If you have that ill intent, please proceed."

Simonds dismissed Tosatto's characterization of the recommendation. "There is no ill intent in this, but given what has happened to our fishery over the last several years ... For three years, our fishery was shut down not [as a result of] anything to do with overfishing," she said, referring to times when the deep-set longline fishery hit its international bigeye quotas before NMFS could make allocations from the Pacific island territories official.

She pointed out that one year, the deep-set fleet had to stop fishing for about three months after reaching its WCPFC quota. "Sixty-five days ... What do you think happened to the market? The reason [for the delay was] the regional office didn't complete paperwork," she complained.

Earlier in the meeting, she expressed her frustration with the service's repeated delays in the issuance of a draft biological opinion on the Hawai'i shallow-set fishery's impacts on loggerhead and leatherback sea turtles. A draft was supposed to have been issued late last year, but still had not been released before the end of the council's March meeting, in part due to the federal government shutdown. In the meantime, because the fishery's annual hard cap for loggerheads had been reduced last year by court order from 34 to 17, the fishery closed on March 19.

Speaking to the recommendation from her staff, Simonds reiterated her long-standing argument that the council needs to be included in the service's planning process. "We have tried every which way to develop [memoranda of understanding] documents, action plans. ... Nothing was working," she said.

She went on to say that the council's and NMFS staffs work well together, but complained that there was no sense of

Shark Workshop

The National Marine Fisheries Service has scheduled a two-day recovery planning workshop for oceanic whitetip sharks, which were listed as threatened in January 2019. The workshop will be held April 23-24 at the Ohana Waikiki East Hotel. Members of the public planning to attend should RSVP to Chelsey Young of the Office of Protected Resources at chelsey.young@noaa.gov or 301-427-8491 no later than April 16.

NMFS is also accepting comments from the public on how to recover the sharks. To submit comments, visit <https://www.regulations.gov/document?D=NOAA-NMFS-2019-0024-0001>.

urgency among the agency's leadership to get things done.

"We do understand what it takes. We've been in this business for 40 years," she said.

Council chair Soliai said he agreed with Simonds that there was no ill intent in the recommendation. "I think this is not a slap in the face, but this is a call to expedited action, just a show that we'd like a little bit more urgency in addressing the concerns we talked about all week," he said.

Despite their assurances, Tosatto said that if the council approved the recommendation, the message sent to his staff would be damaging, nonetheless. "This will ripple through staff, what is sent, even though it's very pointed in my direction," he said.

While he said he took full responsibility for PIRO's actions (or apparent inaction), he explained that there are many reasons why things happen the way they do, suggesting that his agency isn't solely responsible for delays.

"It's a complex business to work in. ... There are many rocks to be thrown. ... There are many fingers to point," he said, later noting that his agency has never received a document from council staff adequate enough to put into the *Federal Register*, without substantial revision. Preparing documents that are acceptable to NOAA's general counsel takes time, he said.

"There are many external drivers. Some the council staff knows about. Some they don't. Some they agree with. Some they don't. At the end, we're going to have a legal document that goes out the door and nothing else," he said.

Continued to page 6

Council Seeks to Quickly Reopen Area Closed Due to Whale Takes

Similar to the Hawai'i shallow-set longline fishery's incidental take of endangered loggerhead sea turtles, the Hawai'i deep-set longline fishery just can't seem to keep its interactions with false killer whales inside the 200-mile U.S. exclusive economic zone low enough to avoid triggering a closure.

A month after killing one false killer whale and seriously injuring another in federal waters in January, the fishery was shut out of a large swath of ocean south of the Main Hawaiian Islands for the second year in a row.

And because it was the second time in two years that the fishery hit its annual mortality and serious injury cap (M&SI), that closed area, known as the Southern Exclusion Zone (SEZ), will remain closed for the rest of the year, and potentially for the next two years.

At its meeting last month, the Western Pacific Fishery Management approved measures intended to help open the zone at the start of next year and to keep it from ever closing again.

How Serious is Serious?

According to a report by the council's Scientific and Statistical Committee, there have been just three observed false killer whale mortalities out of the 50 or so observed interactions with the deep-set fishery since 2013. Of those interactions, NMFS has

determined that two thirds of them resulted in serious injury. Under the National Marine Fisheries Service's rules, serious injuries to the whales

are given the same weight as mortalities, and it takes just two mortalities or serious injuries within the federal waters around Hawai'i to trigger the closure of the Southern Exclusion Zone. According to NMFS staff, a serious injury is any injury to the whale that is more than likely to result in its death.

But what constitutes a serious injury? And how likely is it to lead to the whale's death?

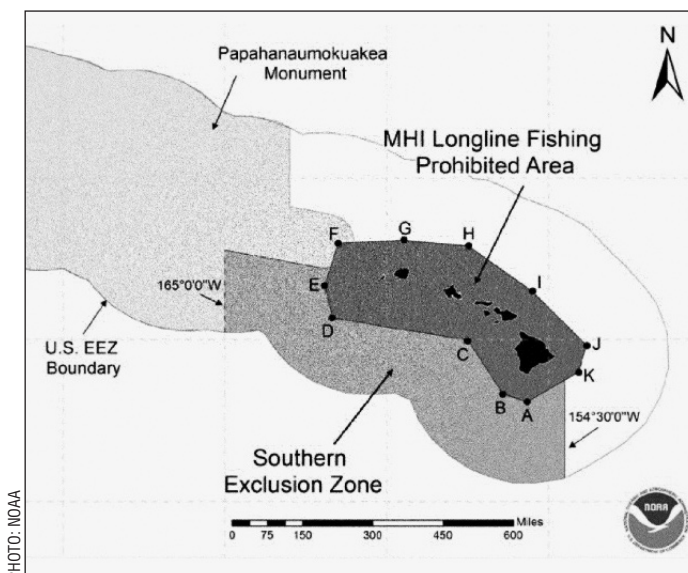
For years, the council has been questioning that, as well as asking for a new abundance estimate for the whales.

A hook in the mouth (unless it's just the lip) is more likely than not to be considered a serious injury, regardless of how little trailing gear is attached, NMFS's Kevin Brindock confirmed to the council last month. However, he added that his agency is considering new information that may affect how serious injuries are determined in the future.

To this, council member McGrew Rice suggested that false killer whales are a lot tougher than they're being given credit for. One false killer whale

found dead had six hooks inside it, he said, and "they determined it wasn't the hooks that killed it."

Continued to page 7



The Southern Exclusion Zone was closed to longline fishing in February because of its mortal interactions with false killer whales.

Shark from page 5

Still, the council members piled on.

Mike Goto, a member of the Hawai'i Longline Association and head of the Honolulu fish auction, explained that he supported the recommendation because he wants to be able to tell his clients, which include both fishermen and marketers, that "everything that could be done was done" to protect the fisheries.

Council member Lutu-Sanchez added later, "We can't tell the fishermen, 'Sorry, you can't go fishing because some report isn't done.' They just don't understand that." As she saw it, the recommendation sends a "message of desperation [for NMFS to] finish whatever needs to be done."

Council member Ed Watamura of the Waialua Boat Club, suggested that the service was biased in its treatment of fisheries.

"Basically, it comes down to a conflict between fisheries and protected species. The fisheries are being affected and shut

down because of the protected species concerns.

"Even if we look at the composition of NOAA and we look at how many protected species people are employed ... compared to sustainable fisheries, it becomes evident where all the money and resources are being put. Just do the math. ... I think the actual focus of resources needs to change," he said.

Council member Henry Sesepasara, who works for the American Samoa Department of Marine and Wildlife Resources, did express concern over what the council's relationship with PIRO would be like if the recommendation were approved. Tosatto assured him that however the council voted, "PIRO and PIFSC will act professionally, competently and diligently."

Even so, Tosatto added that the finger-pointing part of the recommendation "really serves no purpose in this forum here and now." And non-voting council member

Brian Peck of the U.S. Fish and Wildlife Service agreed.

Council member Ryan Okano of the Hawai'i Department of Land and Natural Resources was the sole voting council member — aside from Tosatto — who did not support the motion. Before the council vote, Okano expressed how important he thinks relationships are. "Not everybody agrees with decisions that my agency does, but I still try to retain positive relations. That's the way I was brought up. This" — referring to the recommendation — "bothers me," he said. "I'm not trying to say anybody's wrong, anybody's right. I'm gonna abstain. The reason: I don't want to damage relationships. I don't want to take sides," he said.

(For more background on this issue, see "NMFS Seeks Comments on Protecting Oceanic Whitetip Sharks Under ESA," from our February 2016 issue, available at environment-hawaii.org.)

—Teresa Dawson

Whales from page 6

NMFS is expected to release a new abundance estimate for the population later this year. In the meantime, the council approved a staff recommendation to ask the agency to “consider developing probability-based serious injury determination criteria for false killer whales.”

At a scientific committee meeting held a week earlier, council staffer Asuka Ishizaki presented estimates of what M&SI numbers over the past several years would have been if the serious injury determinations had been prorated down a bit, similar to how NMFS treats injury determinations for larger cetaceans. Based on her calculations, in all years except 2018, the number of animals killed or seriously injured by the fleet came nowhere near the potential biological removal (PBR) limit.

In voicing his support for the council’s serious injury measure, NMFS’s Pacific Islands Regional Office administrator Mike Tosatto said he thought it was time his agency broadened its approach to M&SI determinations and suggested the measure could effect how they are done nationwide.

Record Highs

As the false killer whale take reduction plan is written, serious injury determinations pose a problem for the fishery only when they apply to interactions in federal waters. This, despite the fact that the goal of the plan is to reduce M&SI to zero throughout the fishery, which expends most of its effort in international waters.

The fishery has not only failed to reach that goal, it’s heading in the opposite direction. Brindock informed the council that last year, the fishery had a record number of observed false killer whale interactions, 13, four of which were within in federal waters. All four of those resulted in serious injuries and, as a result, the SEZ was closed from July through December.

While the SEZ has been closed again for the rest of this year, federal regulators will take into account any additional interactions that occur elsewhere inside the exclusive economic zone when evaluating when or whether to reopen the southern exclusion zone.

If the fishery can keep that number low, there is a good chance the SEZ could reopen at the start of next year, given that one of the four criteria for reopening it is if “the recent average M&SI level in the fishery within the open federal waters is below the PBR level.”



False killer whale.

Based on the takes that have occurred so far this year, Ishizaki determined that the M&SI average for 2015-2019 is less than 7. The PBR level is currently 9.3.

Given that, the council voted to ask NMFS to establish a protocol for evaluating the five-year average estimated level of Main Hawaiian Island false killer whale M&SI for the 2015-2019 period to allow reopening of the SEZ on January 1, 2020, if that evaluation determines that the M&SI level inside federal waters remains below PBR.

Crew Training

When the false killer whale take reduction team met last year to discuss possible amendments to the plan to reduce the number of takes, as well as M&SI, it failed to reach a consensus on any measure.

After the whale interactions earlier this year, the team tried again via teleconference. According to Brindock, the team is looking at requiring stronger branch lines to increase the likelihood that whales will be able to straighten the hooks and free themselves without gear attached.

Noting that crews are often cutting lines, rather than trying to encourage hook straightening, he said the team has also discussed improving captain and crew training and employing electronic monitoring on vessels to evaluate handling methods.

He added that the team is also considering “move-on” guidelines, since data have shown that moving a certain distance away from the whales decreases the possibility of interaction.

At the council meeting, members approved a recommendation that NMFS work with council staff to develop and implement an effective captain and crew training program to reduce the risk of M&SI, while also promoting crew safety.

The initial recommendation from council staff was to have NMFS imple-

An abbreviated reading list

- “Bigeye Longliners Hit Limit on False Killer Whale Interactions, Again,” EH-Xtra, February 9, 2019;
- “Bigeye Fishery Struggles to Avoid Whale Hookings, Serious Injuries,” July 2018;
- “With New Whale Hookings, Longliners Face Fishing Zone Closure,” June 7, 2018 EH-Xtra;
- “False Killer Whale Team Fails to Reach Consensus on New Protection Measures,” May 2018.

All articles are available at environment-hawaii.org

ment the training on its own, but Tosatto pointed out that he could not commit agency resources to crew training, since it is not called for in the council’s fishery management plan.

“The council’s current plan only requires captain training, owners and captains, not crew,” he said, adding that mandatory crew training would be a serious undertaking and require serious funds.

Council member and American Samoa longliner Christinna Lutu-Sanchez added that mandating crew training would be difficult since there is a high turnover. Rice also pointed out that training efforts would have to account for the fact that crew members aren’t all fluent in English, since they come from Indonesia, the Philippines, Kiribati, and elsewhere.

“We understand that. ... We’re going to do the best job that we can. We’ll work it out,” council executive director Kitty Simonds replied.

– T.D.

Council Seeks to Preempt Closure Of Fishing Areas on the High Seas

The United Nations last year started negotiations on a treaty that could establish large-scale protected areas on the high seas, raising concern among staff of the Western Pacific Fishery Management Council that the Hawai'i-based longline fleets may lose even more fishing ground than they already have.

With the expansion of the marine national monuments in the Northwestern Hawaiian Islands and Pacific Islands Remote Areas, the deep- and shallow-set fleets—which target bigeye and swordfish, respectively—have increasingly focused their efforts on the high seas. According to council staff, more than 70 percent of the deep-set fishery occurs in international waters. For the shallow-set fishery, it's 90 percent.

More UN negotiation meetings have been scheduled throughout this year and the process is expected to conclude in mid-2020.

Last month, Ray Hilborn, a fisheries scientist and University of Washington professor who sits on the council's Scientific and Statistical Committee, made a presentation to his fellow committee members on why he believes large-scale marine protected areas are ineffective.

Among other things, Hilborn has argued in published papers that MPAs don't protect against much of anything except fishing and don't even do a good job of that, since fishing effort doesn't go away.

It simply moves elsewhere.

In an August 2018 article in the journal *BioScience*, more than a dozen scientists from across the world (including the University of Hawai'i's Alan Friedlander) addressed the many criticisms of large-scale marine protected areas leveled by Hilborn and others.

They conceded that fisheries management can help rebuild overexploited stocks while not addressing the status of non-target species or those that aren't commercially viable, “and it often fails to account for the collateral impacts of fishing.”

“Measures such as bycatch mitigation, gear restrictions, and seasonal closures may reduce some of the broader ecosystem impacts of fisheries. However, MPAs embody long-term ecosystem-based management, protecting vulnerable and under- and unvalued species and helping secure ecosystem integrity through maintenance of trophic linkages, things that usually go beyond the mandate or competence of fishery managers,” they wrote, adding that MPAs also address threats from activities, “such as maritime traffic or oil and mineral exploration and exploitation.”

That being said, Chris Smyth and Quentin Hanich of the University of Wollongong's Australian National Centre for Ocean Resources and Security (ANCORS) released a discussion paper earlier this year detailing the kinds of research needed to fill data gaps regarding large-scale MPAs. The list is long, and includes studies on spillover effects, migratory species, climate change, and socio-economics, among other things.

Both the *BioScience* and discussion paper were funded in whole or part by the Pew Charitable Trusts, which also supports the UN's Intergovernmental Conference in Biodiversity Beyond National Jurisdiction.

At its meeting last month, the council voted to direct its staff to write to the Department of State to convey its concerns over the

text of the UN convention, “including a request that high seas fisheries targeting tuna and tuna-like species be exempt from any potential high seas closures established under the ... convention.”

Council staffer Eric Kingma told the council's scientific committee that if the UN convention does establish high-seas protected areas, it could become a “great concern” since so much of the the Hawai'i longline fisheries' effort occurs there.

“That's why we're so worked up,” he said.



Bigeye Allocations

“This is a messy year. We don't want to complicate things,” council executive director Kitty Simonds said of its recommendations to the National Marine Fisheries Service on how bigeye tuna quotas should be transferred from Pacific island territories to Hawai'i-based longliners.

Every year, the council submits recommendations to the service on how much of the territories' bigeye tuna quota should be assigned to American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, and how much of that quota can then in turn be transferred to the Hawai'i longline fleet. The quota specifications implement measures adopted by the international Western and Central Pacific Fisheries Commission.

In years past, the council suggested NMFS allocate more than what's been traditionally granted, up to 1,000 metric tons (mt) per territory. Calculations by council staff indicate that doubling that amount—for a total of up to 6,000 additional mt—wouldn't result in overfishing.

The likelihood that an increased effort by the Hawai'i fleet would somehow endanger the stock is even slimmer, Kingma argued recently, since the longline fleets for countries such as Indonesia and Japan are underutilizing their quotas. Japan, in fact, has transferred some of its quota to China, he said at last month's meeting of the council's Scientific and Statistical Committee.

Kingma said it was “happy times” for bigeye in the region, in light of the commission's recent stock assessments indicating that the fish are neither overfished or subject to overfishing. Even so, the United States' quota has been stuck at 3,554 mt in recent years, although it's been able to catch much more under the territorial allocations. Last year, the Hawai'i longline fleet caught about

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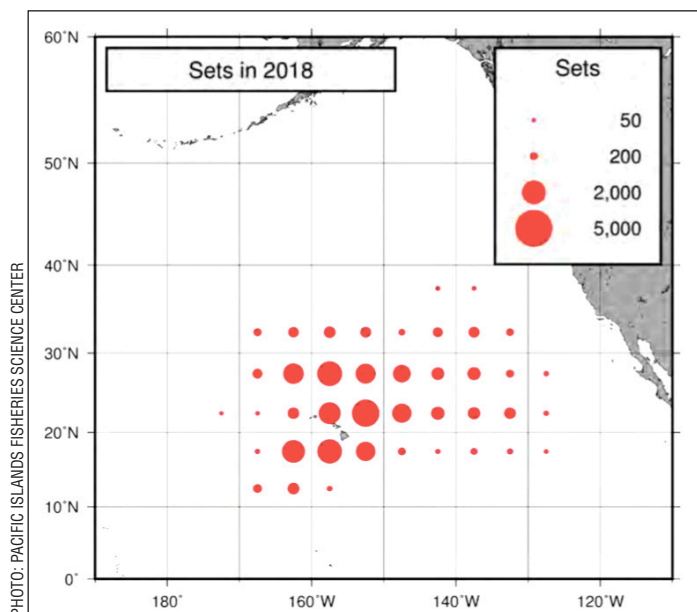


PHOTO: PACIFIC ISLANDS FISHERIES SCIENCE CENTER

As this map shows, the Hawai'i longline fleet fishes mostly on the high seas.

5,100 metric tons. One-thousand mt came as quota transferred from the Commonwealth of the Northern Mariana Islands, and about 100 mt came from American Samoa's.

At last month's council meeting, member Mike Goto, who manages the Honolulu fish auction, stressed that it was important for NMFS to complete its rules governing the allocations in a timely manner. In years past, when the fishery was catching bigeye at an unusually high rate, the fleet had to halt temporarily while the allocation rules were finalized.

Mike Tosatto, administrator for NMFS's Pacific Islands Regional Office, pointed out that the bigeye catch rate has returned to its long-term average and said the rules this year should be done quickly if they simply maintain the status quo.

With that in mind, council staff said they will delay until next year a recommendation that NMFS prepare multi-year allocation rules. It also recommended that NMFS maintain the status quo in terms of the territorial allocations.

Goto said that the status quo allocations were sufficient, even in the boom years. However, he added, "we can definitely do more with more."



Black-Footed Albatross

In 2015, the Hawai'i longline fishery — mainly the deep-set portion — saw a sharp increase in the number of black-footed albatross hookings and they have stayed high ever since.

Last year, the council held a workshop to explore possible mitigation measures. Priorities identified were captain and crew training, side-setting, bird curtains, tori or streamer lines, towed buoys, and branch line weighting. With specific regard to the shallow-set fishery that goes after swordfish, night setting and offal management were considered moderate priorities.

While Laysan and black-footed albatross populations are stable or increasing, they are protected under the Migratory Bird Treaty Act.

The increase in black-footed hookings could be due to a combination of factors, including an increased overlap of fishing grounds and albatross habitat, "captain effects" (a small number of captains are having a higher number of interactions), and/or habituation by the birds to existing mitigation measures, such as blue-dyed bait.



PHOTO: NOAA

A black-footed albatross.

The mitigation requirement to use blue-dyed bait was deprioritized. Council staffer Asuka Ishizaki explained that the effectiveness of the bait was originally tested on squid, but the fishery has been using fish instead.

What's more, fishermen find that thawing and then dying the bait is impractical, and it also reduces bait retention on hooks, she continued.

Workshop participants determined that the birds' increased interactions with the Hawai'i longliners alone was likely to have an imperceptible difference on the black-footed albatross population growth. "They did find, if they assumed the increase was North Pacific-wide, and it was the new normal, that's when you saw a decline in population over time," Ishizaki told the council last month.

That conclusion, however, was based on data going as far back as 2002 and did not take into account more recent measures adopted by regional fishery management organizations that require better seabird mitigation, she argued.

Included in the seabird bycatch measures approved by the council last month was a recommendation that the National Marine Fisheries Service prioritize conducting an international bycatch assessment for North Pacific albatross species to better determine the relative risk the Hawai'i fleet poses to the birds. (The council approved the measure despite NMFS Pacific Islands Regional Office administrator Mike Tosatto explaining that his agency "doesn't do that.")

The council also asked the service to investigate whether blue-dyed bait reduces catch rates of targeted species, perhaps resulting in increased effort and thus also more seabird interactions.

Ishizaki proposed to address the "captain effects" through strategic outreach.

"Fishery participants may not be aware of recent higher interactions," she said, adding that NMFS and staff were developing a

"report card" approach to inform captains of their bycatch performance and facilitate training opportunities.

"This could have a much larger effect than modifying gear measures," she said.

Council member Ryan Okano, representing the state of Hawai'i, asked whether the report card would include data on turtle and false killer whale bycatch.

It would not, she said, although she did note that the albatross interactions are similar to those for loggerheads in that observers are "seeing large number of interactions with a small number of trips."

"The industry could take that on as part of a way to stay under hard caps [for turtles and false killer whales]. In this instance with seabirds, we're looking at it because we don't have a hard cap for birds," she said.



Monk Seals

The endangered Hawaiian monk seal population is estimated to have grown from 1,351 individuals in 2017 to 1,429 last year, according to Mike Seki, director of the Pacific Islands Fisheries Science Center. The growth was mainly attributable to the Northwestern Hawaiian Islands population.

Seki told the council's scientific committee last month that despite the increase, pup survival is at an all time low. Pups die due to shark predation, weather, and natural causes, he said.

"A big concern is the disappearing of Trig and East Islands in the fall. What that means for the population going forward has yet to be seen," he said.

The Main Hawaiian Islands population appears stable, but the status and trends are ambiguous, he continued, since "a lot of the seals are on Ni'ihau and Lehua island, where scientists don't have a lot of access."

— T.D.

BOARD TALK

Billionaire NBA Team Owner Wins Permit to Build Hanalei Compound

Mark Zuckerberg isn't the only mainland billionaire who wants a private compound in North Kaua'i for his family. On January 25, Helios Hanalei, LLC — a company formed by Atlanta Hawks co-owner Michael Gearon, Jr. — received approval from the state Board of Land and Natural Resources of a Conservation District Use Permit to construct a single-family residence on a sloping bluff above Hanalei valley, along Kuhio Highway, the island's belt road.

The board included several conditions intended to ensure that vegetation will hide the home from most vantage points. Should Gearon reduce the amount of vegetation that's already on the property, he could face daily fines of \$2,000 a day and potentially be required to remove all improvements.

While a number of Hanalei residents expressed their opposition to the project, no one was granted a contested case hearing by the board.

The House

The proposed five-bedroom single-family residence is actually seven 18-foot-tall buildings connected by a cedar roofline. The footprint of the home will span nearly 5,000 square feet, which is the maximum developable area for the parcel. In addition to a saltwater pool and decking, Gearon plans to build a spa/hot tub area, lava rock retaining/privacy walls, outdoor showers and a cooking area, as well as "hardscaping." (The staff submittal to the Land Board men-

tions another use — "equipment building" — without further elaboration.)

Gearon intends to plant milo, hala, loulou, and naupaka on parts of the property, in part, to preserve the Hawaiian "sense of place," according to a report by Sam Lemmo, administrator for the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL).

In his report, Lemmo notes that his office received many public comments on the proposed development. The most common concerns were that the home may be intended for commercial use and that it will damage viewplanes or pose a problem should the bluff experience a landslide.

At the board's January meeting, Lemmo said that most of the house would be concealed by the existing vegetation along the bluff. "Possibly, the roof could be seen," he said.

Should Gearon start to remove trees or improve his viewplane, the house could become more visible, Lemmo warned. To deter that, his division included permit conditions requiring the homeowner to maintain the vegetative buffer in its current state. While Gearon does plan to improve the screening vegetation, he will face penalties if he tries to reduce it, Lemmo said.

Lemmo noted that Gearon chose to keep the height of the house to 18 feet, which is seven feet shorter than what is allowed under Conservation District rules. However, Lemmo said he was a bit irritated at the fact

that he received no response to a request that the landowner provide an alternative to the proposed house.

Land Board members Keone Downing and Stanley Roehrig questioned Lemmo about what the penalties might be should the landowner, say, start running a wedding business or a bed-and-breakfast on the property.

Lemmo said that one of the permit conditions is that the residence shall not be used for rental or any other commercial purpose. As a penalty, he said the board could revoke the permit or impose fines of \$2,000 per violation per day if the owner doesn't cease the unauthorized use.

A deputy attorney general advising the board added that the board could also require the landowner to remove the home.

Addressing the likelihood that Gearon would use the home for commercial purposes, Lemmo asked the board, "Do you people care to know who this guy is? ... I've interacted with these people. I doubt they would do an Airbnb here, but I hear your concern."

Attorney Jean Campbell, representing Gearon, assured the board that he's not planning to cut any trees or conduct commercial uses on the property.

"He is interested in his privacy and the mountain view and distant ocean view. He doesn't want to see Hanalei town," she said, adding that she agreed with the deputy attorney general that if the permit is voided, the house can go. "He's not interested in commercial uses. ... That's so far from anything he has in mind. He wants this to be a legacy for his family," she said.

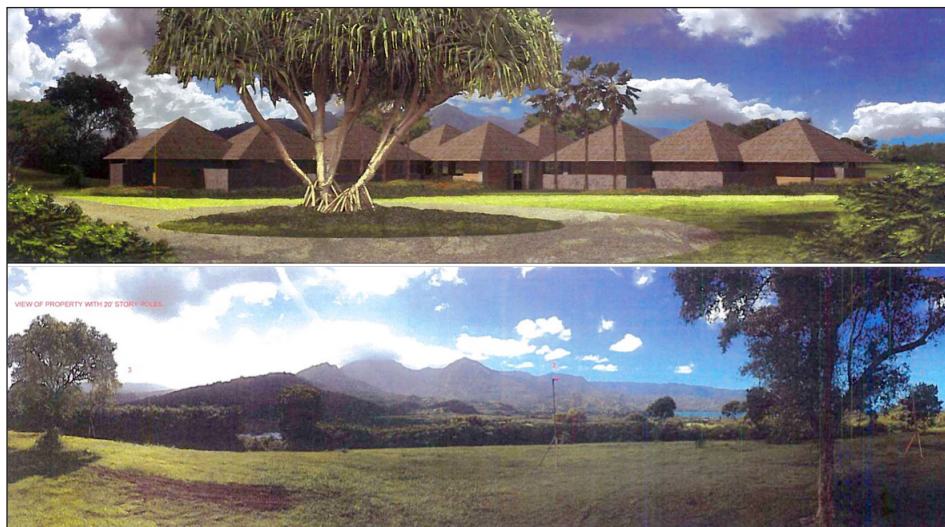
Gearon's sister Tierney added that moving to Kaua'i has long been a family dream. "My dad's getting older. My brother is trying to have that dream come true," she said.

Open Space

To Hanalei resident Mina Morita, the home Gearon proposed to build was more like a nightmare.

In written testimony to the board, Morita — a former state legislator, Public Utilities Commission director, and *Environment Hawai'i* board member — warned that if the permit was approved, it would threaten the open spaces the Hanalei community has been trying to preserve ever since the dedication of 1,000 acres for the Hanalei Wildlife Refuge in 1968. She stated that the community's intent is "reflected in numerous planning documents and ordinances."

Morita urged the board to "revisit the original intent when the subdivision of



(Top) An artist's rendering of the proposed residence. (Bottom) A view of the home site overlooking Hanalei.

Princeville occurred, that the parcels surrounding the perimeter of Hanalei Valley were intended to be greenbelts and in line with the conservation, protection and preservation of natural and cultural resources."

At a public hearing in Hanalei on the permit last October, she expressed her dismay that "zoning and land use designation loopholes and lack of recordation of intent at the time of the original subdivision have not protected parcels like this one from development."

In her written testimony, she claimed that when, in the 1960s and 1970s, land was subdivided in connection with the development of Princeville, "lots along the perimeter of Hanalei Valley were intended to be green belts, a buffer zone, to protect the Hanalei Valley area from the visual impacts of development."

She offered the parcel's sales history as evidence that the property was never meant to be developed. "In keeping with the original intent of this lot as a green belt buffer, this parcel was valued at \$0.00 prior to 2005," she testified.

Because the intent to preserve the land was never properly recorded, the sales price of the 14-acre parcel has ballooned, from \$5,600 in 2006 to \$1.1 million in March 2012, she said. Gearon bought the land in 2016 for \$4.3 million.

At the board meeting, member Chris Yuen asked Lemmo whether he was aware of any documentation that confirmed Morita's claim that the property was intended to be open space in the Princeville master plan. Lemmo said he was not.

Kaua'i Land Board member Tommy Oi said that when he was still a land agent for the DLNR, a previous owner offered to give the land to the state, but the state didn't want it.

Landslide Risk

In addition to concerns over the loss of open space, Morita and fellow Hanalei resident Carl Imperato also worried about how landslides from the ridge would affect their ability to get in and out of the valley.

In her written testimony, Morita informed the board that there have been two landslide events after one last April temporarily closed the Belt Road.

"The proximity of the area to be developed (the western end of the lot) is well-known for water seepage appearing on the highway, causing recurring potholes. This ongoing hazard area is currently marked with concrete barriers along the highway," she continued. She also asked what kind

of right of way would be available for Department of Transportation (DOT) slope mitigation projects if Gearon's structures impede access. Imperato raised the same concern at the board meeting.

"Access to the parcel for slope stabilization/mitigation work should be preserved by the state and a condition of this permit with the stipulation that built structures should not impede this access," Morita wrote.

Lemmo told the board that when his division asked the DOT whether it had any concerns about slope stability issues, "nobody would say the home was a problem for them."

Imperato requested a contested case hearing on the basis that he was a Hanalei resident whose access to his home could be affected if the development didn't provide a buffer sufficient for the state to mitigate landslide effects. After an executive session, the board voted to deny his request.

Board member Yuen later pointed out that given the topography of the lot, stormwater would "not flow uphill and come down the cliff to the location where they've been having problems. ... Where the house is located, which is closer to the hairpin turn, the slope is much less."



PHOTO: HELIOS HANALEI, LLC ENVIRONMENTAL ASSESSMENT

An artist's rendering of the aerial view of the completed residence.

Permission Granted

Yuen, a former Planning Director for Hawai'i County, seemed satisfied with Gearon's efforts to design an unobtrusive residence. "You could build an awful thing upon this ridge. ... They could have made a house that maximizes their own view," Yuen said.

He added that, in this case, he was not worried about the permit conditions being enforceable, given the community interest in the project. "If they violate, we are going to get a complaint. ... People are gonna be howling," he said.

"Believe me, we're gonna get a lot of complaints regardless of what they do or don't do," Lemmo replied.

With a motion from Oi seconded by Maui member Jimmy Gomes, the board unanimously approved the permit.

Continued on Page 11



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Way back in 1990, when the first edition of *Environment Hawai'i* was launched, the world wide web didn't exist. Faxes were still a thing. Email was a few years away from common usage. And Hawai'i had a crying, unmet need for independent, investigative reporting on environmental issues.

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Board Talk from Page 11



Ala Wai Flood Permit

The Land Board has granted a right-of-entry permit to the U.S Army Corps of Engineers to allow the agency to conduct due diligence work on state land for its massive flood control project, which will include walls along the Ala Wai canal as well as detention basins throughout the watershed.

Ahead of the board's vote on January 25, Corps project manager Jeff Herzog told the board that the agency needed the permit to do things like conduct further topographic work to get exact elevations along the Ala Wai canal and

bore into the ground to determine what kind of walls should be built to prevent overflowing.

Dave Watase, a landowner whose property the corps is planning to condemn for one of its detention basins, testified in opposition to the permit.

"I'm a one-man band hoping to build an army to fight the Army Corps' crazy ideas for the Ala Wai project," he said.

Watase said the corps targeted his entire 35,000-square-foot property along Waiohio Stream for a detention basin in September 2015. "I've since been living under the veil of this threat," he said, adding that he had hoped his three children could one day build their homes on the property.

He argued that it was premature for the

Land Board to grant a permit for exploratory work on the Ala Wai flood control project because "public uprising will stop it."

After an executive session on what seemed to be Watase's contested case hearing request, the board voted to deny it.

It did, however, vote to approve the permit to the Army Corps.

Before the final vote, board member Stanley Roehrig encouraged the corps to "use a little softer hand with these local people."

"I think if you folks are a little kinder [you'll] get a lot better reaction. If things heat up, the problems get bigger and bigger and bigger. ... If you want this project to go forward because it has merit, that gets to be a problem," he said.

—T.D.