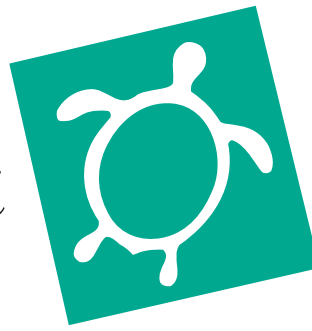


Environment



Hawai'i
a monthly newsletter

When a Stream Bows Out

Over time, streams naturally change their course. But in the case of Waialua Stream, on Moloka'i's eastern end, that natural process has been helped along by some very unnatural events.

Taro lo'i once fed by the stream have been abandoned, with the invasive Java plum now taking over. Mountain slopes upstream have been largely denuded by introduced deer and feral ungulates, burdening the stream with rocks and mud. A new (1972) bridge over the stream near its mouth raised the roadway embankments, increasing the flood plain area mauka of the bridge.

In response, the channel has bowed out, and the more meandering stream is no longer able to blow out the sand that collects at the mouth.

Efforts by local residents who now have to live with the flooding that has resulted from all these changes are at their wits' end. The outcome – a crackdown by the Environmental Protection Agency, the Department of Health, and, possibly, the Commission on Water Resource Management – may be legally justified, but it hardly seems fair.

IN THIS ISSUE

2

*New & Noteworthy:
'Aina Le'a Update,
And Corrections*

3

*Hawai'i Longliners Con-
tinue to Hook False Killer
Whales in Federal Waters*

7

*Board Talk: Pua'ahala,
Kane'ohe Bay Rules*

11

*Setback Rule Changes
Coming to O'ahu, Maui*

Moloka'i Flooding Frustrates Residents Who Now Face EPA, DOH Enforcement

The forecast for Moloka'i was grim in late August of 2018. Hurricane Lane, a category 5 hurricane, was on a track that put the Friendly Isle in its cross hairs.

Charles "Chuck" Miguel Sr. was taking no chances. The lot on which his house sits does not directly abut Waialua Stream, but it is close enough – about 200 feet from the western bank of this perennial stream on Moloka'i's south-eastern coast – that high water generated by heavy rains or ocean swells rushing inland could flood his carefully tended gardens and lawn.

On Wednesday, August 22, ahead of Lane's anticipated arrival on Friday, Miguel and a few of his neighbors grabbed their shovels and dug a channel through the sand bar that regularly forms at the mouth of the stream, blocking its flow and causing it to flood its banks upstream.

In addition, Miguel cleared downed trees from the stream.

Moloka'i avoided a direct hit from Lane, although power outages occurred throughout Maui County.

But with another two months in Hawai'i's hurricane season, Miguel continued to be worried about potential flooding.

Debra Mapel, whose house is to the east of the stream, often assists Miguel with the heavy task of digging through the sand bar. If the plug isn't cleared, she told *Environment Hawai'i*, there's the real danger that the stream will be effectively dammed. Water in the stream will rise and the debris it carries – rocks and vegetation from erosion along the channel upstream and branches shed by invasive Java plum trees, among other things – can wash up against the bridge just a few hundred

Continued on Page 4



PHOTO: COURTESY DEBRA MAPEL

Charles Miguel Sr. digging out the sand plug at Waialua Stream. Note high water under bridge.

Environment

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NEW AND NOTEWORTHY

'Aina Le'a Keeps Whiffing: Since August, 'Aina Le'a, Inc., has been attempting to win approval from the Hawai'i County Planning Department of an environmental impact statement preparation notice, or EISPN.



An artist's rendering of the townhouses.

The notice is a necessary first step in moving forward with construction on about 1,100 acres of land in South Kohala that have been the subject of controversial development plans for the last three decades.

Environment Hawai'i

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A decade ago, the county accepted an EIS for the land, but, following a court challenge, it was deemed insufficient and 'Aina Le'a was informed it needed to prepare a new EIS.

For several years, 'Aina Le'a was preoccupied with litigation over the Land Use Commission's decision to revert the land to the state Agricultural District (overturned) and then a bankruptcy petition. Last spring, it emerged from bankruptcy with a reorganization plan. Since then, its chief executive officer, Robert Wessels, has been pressing the Planning Department to approve an EIS prep notice.

The first one he submitted was in late August.

It was rejected by the county on September 9.

In October, Wessels tried again.

Once more, the county rejected it on October 31, referencing the same flaws it identified in the earlier rejection letter.

Wessels tried a third time on the day before Thanksgiving. This, too, was unacceptable to the county.

One of the persistent problems identified by the county is the reliance by Wessels on studies conducted a decade or more ago for the original, rejected EIS. Wessels is relying on a landscaper, Christian Renz of Waikoloa, to prepare

the new environmental documentation, although Renz has no history of work in this area.

Renz is more than just a landscaper, though. In July, Wessels established a new business, B-I-A D-I-A, LLC, and named Renz as its agent. On August 1, 'Aina Le'a, Inc. – the manager of the new entity – transferred ownership of the two largest parcels, amounting to 1,011 acres, to the new company. (The obscure name is drawn from the way the two parcels are identified in some planning documents.)

The county was not informed of the change in ownership, nor was the new company identified as owner of the two lots in the several EIS prep notices submitted.

Should Wessels ever get to the point he needs to get plan approvals for construction, he faces yet another hurdle. Property taxes on the land have been unpaid for several years. According to the county's Finance Department, as of November 30, 'Aina Le'a owed more than \$725,000 in unpaid taxes plus penalties and interest.

Corrections: In making his motion to approve water use permits to Alexander & Baldwin last year, Board of Land and Natural Resources member Chris Yuen did not add a condition requiring a sublessee establishing an annual crop to harvest it before the permit expires, as we reported in our November 2019 Board Talk item on water permits. Rather, Yuen required Mahi Pono, LLC, to inform any lessees that rely on irrigation water received via the revocable permit that the availability of water is based on a month-to-month permit that ends in a year.

Also, in our November 2019 story on the membership of the Western Pacific Fishery Management Council, we referred to Manuel Duenas of Guam's fisherman's coop when we meant Michael Duenas, Manuel's son.

We sincerely regret the errors.

Quote of the Month

*"When you have the governor
and mayor on television,
predicting doom and gloom, we
had to do something. Nobody
was coming to help us."*

— Debra Mapel

Hawai'i Longliners Continue to Hook False Killer Whales in Federal Waters

In late November, the Hawai'i deep-set longline fleet, which targets bigeye tuna, caught three false killer whales in federal waters off the Big Island. All of them were released alive, but had been hooked in the mouth area and freed with hooks, wire leaders, weights, and branch lines attached.

The National Marine Fisheries Service (NMFS) had not yet announced by press time whether the whales' injuries were serious enough to likely end in their deaths, which could influence whether longliners will be allowed to resume fishing this year in the swath of waters south of the Hawaiian islands known as the Southern Exclusion Zone (SEZ).

In accordance with its false killer whale take reduction plan, NMFS closed the zone last February after the fleet killed one false killer whale and seriously injured another within the 200-mile exclusive economic zone (EEZ) around the islands a month earlier. It was the second time NMFS closed the SEZ in two years.

Under the criteria set forth in the take reduction plan, the zone can only be reopened now if 1) after receiving the federal take reduction team's recommendations, the agency determines that reopening is warranted; 2) in the two years following the closure, the fishery has no observed false killer whale mortalities or serious injuries (M&SI) in the federal waters that are still open; 3) the fishery reduces its total M&SI rate by an amount equal to or greater than the rate necessary to reduce M&SI to below the pelagic stock's potential biological removal (PBR) level; or 4) the recent average M&SI level in the fishery within the open federal waters is below the PBR level for the pelagic stock at that time.

The agency's past practice has been to consider mouth hookings of false killer whales serious injuries. However, NMFS officials said last year that the agency was reviewing how it makes its serious injury determinations. Longer trailing gear would increase the potential to constrict the animal or impede breathing or feeding, Kevin Brindock of NMFS's Protected Resources Division told the

Western Pacific Fishery Management Council in June.

The animals caught in November were released with branch lines of 0.4, 0.9 and 10 meters in length.

Should NMFS determine the injuries to all three of these animals were serious, it's unclear whether that alone would keep the SEZ closed.

Last March, fishery council staff suggested that the SEZ could reopen this year if the fleet limited its M&SI so that the most recent five-year average within the EEZ remained below the current PBR level of 9.3. The 2014-2018 average was 6.49.

According to Hawaiian false killer whale expert Robin Baird, who also sits on the animals' take reduction team, "When 2019 is included, the high rate [of M&SI] from 2014 will drop out, so how much the average over the five years from 2015-2019 goes will depend on how many of the three remaining 2019 cases end up being serious injuries. If only two of them are, the five-year average will increase to approximately 7.17 (assuming the percent [of observer] coverage inside the EEZ is the same as it was in 2018). If all three of them are serious injuries then it will go up to about 8.37. If PBR remains at 9.3 (what it was in the last [stock assessment report]) then it'll still be below PBR in either scenario."

Baird's hypothetical M&SI numbers for 2015-2019 assume that the fleet didn't kill or seriously injure any false killer whales within the EEZ after November 25. It also assumes that there is no "observer effect," where crews behave differently when federal observers are aboard.

The Hawai'i deep-set longline fleet currently maintains observers on about 20 percent of its vessels. (Vessels where no observers are on board hardly ever report hookings of protected species, thereby making the percentage of observer coverage for the entire fleet an important factor in extrapolating the probable total number of incidents.) Baird noted that a false killer whale hooking in May was a case where the crew worked to help the animal free itself, which is what it is

supposed to do. The fact that the injury to the animal in that case was not considered serious "plays a role in how the [serious injuries] are extrapolated to the unobserved takes," he said.

In any case, NMFS Pacific Islands Regional Office administrator Mike Tosatto told the council last June that there was zero potential of reopening the SEZ by January 1, because data from all of 2019 had to be analyzed first to determine if the conditions for reopening the zone have been met.

Whether that occurs before NMFS sets a new PBR level remains to be seen. Amanda Bradford of the Pacific Islands Fishery Science Center's Protected Species Division reported last October to the council's Scientific and Statistical Committee that the agency was preparing a new false killer whale abundance estimate that will include data collected during a 2017 cetacean survey around the Hawaiian islands. The results of that work are expected to undergo external scientific review in March and a new PBR level will be set based on the new abundance estimate.

While the Hawai'i Longline Association has complained that the closure of the SEZ leaves open only 17 percent of federal waters around Hawai'i to fishing, the closure did not deter the fleet from burning though its annual bigeye quota of 3,554 metric tons set by the international Western and Central Pacific Fisheries Commission, as well as quota obtained through sharing agreements with American Samoa and the Commonwealth of the Northern Mariana Islands last year. Together those agreements allowed the fleet to catch an additional 2,000 metric tons.

Plan Amendments

It's been more than six years since NMFS adopted the current false killer whale take reduction plan, and last year the agency made it clear that the plan was not working. Despite requiring vessels to employ stronger branch lines and weaker hooks to better allow hooked whales to work themselves free if the vessels maintain proper line tension, deaths and serious injuries have only increased.

A NMFS review of hookings both in-

Continued to page 4

FKW from page 3

side and outside the EEZ reveal that crews are often cutting branch lines. Sometimes the lines break.

To prevent the latter from happening, NMFS will initiate a study early this year that compares tuna catch rates with differently sized hooks (4.5 millimeter and 4.2 mm).

Baird says he's not convinced that a 4.2 mm hook will be effective. "That said, as is obvious from the observer data, the crew are often just cutting the lines, leaving animals with a lot of trailing line that could then entangle the individual, so additional training (of crew as well as of captains, and in the various languages of the crew) is clearly needed," he stated in an email to *Environment Hawai'i*.

Earthjustice attorney David Henkin agreed that something needed to be

done to prevent crews from cutting lines. "Entanglement in trailing gear is a major source of post-hooking mortality, so the fact that longliners are cutting the lines is a major concern that needs to be addressed. Moreover, cutting the lines is ultimately self-defeating for the longliners, as leaving trailing gear can increase the rate of mortality and serious injury, resulting in increased restrictions on the fishery. ... [I]f the longliners simply cut the lines, that can defeat the benefits of any gear modifications," he said.

In two of the three hookings that occurred in November, the captains cut or directed their crew to cut the lines. In the third case, the line broke as the captain maneuvered the boat to create tension on the line and straighten the hook.

Even if the fleet adopts the right combination of gear and gear handling,

Baird argues that the observer effect on crew and captain behavior still needs to be addressed.

"[W]hen no observer is on board, I think they probably cut the lines much more frequently. Without electronic monitoring, particularly video monitoring of the crew behavior when a false killer whale or other protected species is on board, I think the plan, whatever its configuration, is flawed," Baird said.

(For more background, read "Council Seeks to Quickly Reopen Area Closed Due to Whale Takes," from our April 2019 issue, and "False Killer Whale Team Fails to Reach Consensus on New Protection Measures," from May 2018. Both and more are available free on our website, www.environment-hawaii.org.)

— **Teresa Dawson**

Waialua from page 1

feet away from the ocean. That bridge carries the only road, Kamehameha V Highway, that links Moloka'i's central town of Kaunakakai and its airport to Halawa Valley on the island's eastern tip, around 9 miles away from the Waialua Stream bridge.

"If the bridge clogs, we're doomed," Mapel said.

'We Had to Do Something'

On September 1, a tropical depression formed in the eastern Pacific Ocean, southwest of Mexico. A few days later, it became a tropical storm named Olivia.

By September 7, it was a Category 4 hurricane headed straight to Hawai'i.

The forecasts were alarming.

"When you have the governor and mayor on television, predicting doom and gloom, we had to do something," Mapel said. "Nobody was coming to help us."

Beginning on September 6, Miguel and Mapel began work on what Mapel describes as a catchment basin. "It was a joint project," Mapel said. "I bought the fuel, he drove the equipment," Miguel, a retired heavy equipment operator, drove a mini-excavator through property owned by Mapel and her partner, Jules Dudoit, onto two vacant lots immediately east of

the stream. They then began creating an area intended to capture the stream's burden of debris, branches, and rocks before it entered the oxbow bend just upstream of Miguel's property.

On September 9, in anticipation of Hurricane Olivia hitting the isles, Governor David Ige signed an emergency proclamation declaring all four counties disaster areas. Two days later, Moloka'i felt the storm's impact, with Olivia dumping 10 inches of rain on Moloka'i in 24 hours.

"Miguel's yard filled with debris and we all flooded," Mapel said. "The sand plug was blown out, but eventually high tides brought it back inside the stream."

At some point in September, someone notified federal, state, and county agencies of the work Miguel and Mapel were undertaking.

On October 10, two inspectors from the Army Corps of Engineers visited the site. They estimated the basin – now called a diversion – to be about 450 feet long, 12 feet wide at the base, and 22 feet wide at the high water mark. From these dimensions, they figured the total area of excavation came to roughly a quarter of an acre and that some 1,679 cubic yards of material had been displaced from the vacant lots, which they determined were part of a wetland. It was their conclusion that this constituted a violation of the Clean Water Act.

Continued on next page



PHOTO: BOBBIE TEIXEIRA (DOH)

A photo included in the DOH inspection report shows the view facing upstream near the channel dug out by Miguel. To the left (blue arrow) is Waialua Stream; the red area points to the diversion.

Miguel says he was just following the stream's original alignment.

"The reports make it sound like we dug the Panama Canal," Mapel said.

Ownership Issues

Miguel does not own either of the two properties that were bisected by the channel he dug. He and Mapel had earlier received permission to clear invasive vegetation from one owner, who was not on the island when the storms hit.

In any event, obtaining permission from all the landowners would have been – and still is – problematic. One of the lots is owned by a family estate and an individual living on the mainland; taxes on that one-acre lot haven't been paid in a decade. The other lot, about a third of an acre, has no fewer than 15 owners listed in county property tax records. Several of them are identified as deceased, others have no known address, and still others have mainland addresses in California and Florida. Taxes on this lot as well have been unpaid for more than a decade.

Yet in their report, the Corps of Engineers inspectors noted no such problem in obtaining owner permission to visit the site. "[T]he Corps received verbal permission for access over the phone from Mr. Paul Cullen, land owner, on September 28," their report states.

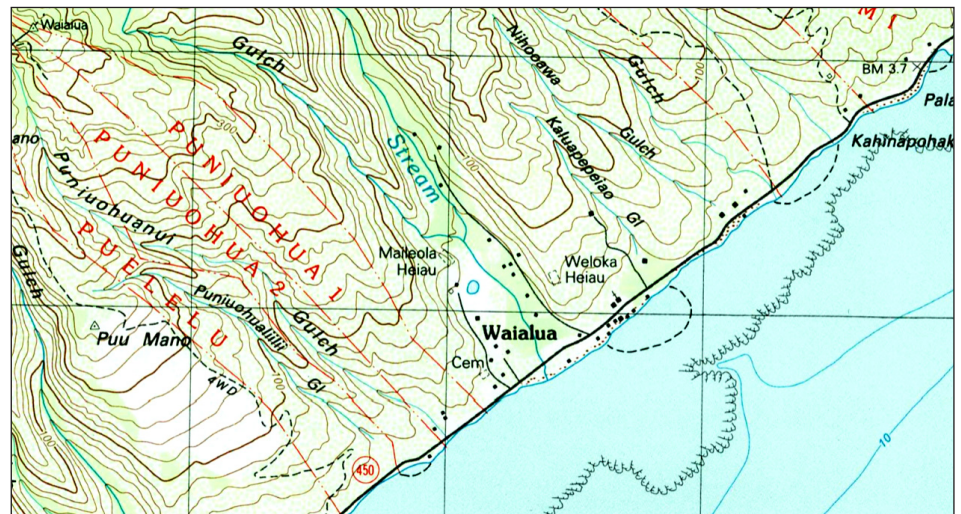
"Oh, God. Paul Cullen. Our worst nightmare."

That was Mapel's response when asked about Cullen's involvement. "He lives in a blue tarp about a quarter-mile down the road," she said. "He asked the county real property tax office to put his name on the tax record for one of the lots adjoining the stream, but he's *not* an owner."

The property tax record for the larger parcel does display Cullen's name – but does not identify him as an owner. Mapel said that she had asked the tax office about this and was told that anyone can add their name to a property tax record as an "addressee."

(*Environment Hawai'i* made several calls to Maui County tax officials to explain how this could happen; none was returned by press time.)

Cullen also held himself out to be an owner when two Department of Health Clean Water Branch investigators, Bobbie Teixeira and Steven Chase, came to Moloka'i on October 12. Accompanying them were Connor Adams of the Environmental Protection Agency and



A 1983 USGS map shows Waialua stream flowing straight into the sea.

Anthony Fukuoka, a building inspector from Maui County.

In her write-up of the site visit, Teixeira noted that "Mr. Paul Cullen identified himself as a property owner." She went on to note, however, that he was not listed as an owner in Maui County real property tax records.

Enforcement

At the time of the visit, Teixeira later wrote in the inspection report, "the diversion was open at both sides. Water from Waialua Stream was actively flowing through the diversion. Bare soil was observed within the diversion at the bottom and along the banks. Flow observed in the diversion was turbid brown. ... The slopes along the diversion were exposed and unstabilized."

Mapel disputes Teixeira's claim that the area dug out by Miguel connected to the stream on both ends. "Two days earlier, when the Corps inspection occurred, photos showed the channel dry and returning to natural grade, not going completely across the makai lot," she said. "But it had rained up the mountain the night before the DOH and EPA arrived, so brown water was flowing across the property."

Miguel, Teixeira wrote, "stated that all work was done in preparation or response to impacts of several storms." She then added, "During the 2018 hurricane season, multiple hurricanes and tropical storms were forecasted to impact the Hawaiian Islands. An Office of the Governor State of Hawai'i Emergency Proclamation was issued for Hurricane Lane suspending Hawai'i Water Pollution Laws However, a proclamation

suspending [laws] for Hurricane Olivia was not declared."

"Teixeira is wrong," Mapel said. "The original proclamation was extended to a later date that included Hurricane Olivia."

Miguel admitted that he had obtained no permits for the work from any agency. "However," Teixeira said in her report, "he believed a 1986 Reconnaissance report written by the Soil Conservation Service provided coverage for the diversion work."

On October 23, the Department of Health ordered Miguel to cease work. In a follow-up call from Teixeira in December, Miguel acknowledged receiving the letter and said he had been advised by the county "to either obtain a grading permit or restore the ditch." "Mr. Miguel stated that a grading permit was not obtained and no work at the ditch has been done," Teixeira wrote in her report of the call.

On February 20, the Department of Health issued a Notice of Violation and Order to Miguel. Among other things, it required Miguel to submit a corrective action plan to the DOH within 60 days and, after receiving DOH approval, implement it within 30 days. In addition to receiving authorization from the private landowners and county, state, and federal agencies, "the corrective action plan must clearly detail how you will restore the diversion to pre-existing conditions as well as the Best Management Practices that will be implemented to prevent further discharges," the order reads.

Also, Miguel was to pay an administrative penalty of \$20,000 within 20 calendar days of the date the NOVO was served.

Continued on next page

As allowed, Miguel requested a hearing, where Miguel could be assisted by counsel and present evidence and witnesses. Teixeira told *Environment Hawai'i*, "Scheduling a hearing is pending, based on the outcome of ongoing negotiations."

The Resolution

The EPA undertook its own investigation, sending a formal request for information to Miguel on April 4, 2019. (Explaining the dual enforcement actions, Teixeira said, "While the DOH and EPA often communicate and coordinate, both agencies are free to act independently of each other. In this case, both agencies took separate actions but seek similar outcomes.")

Miguel responded to the EPA six weeks later, providing additional information and photographs. At that time, he said that he had begun earthmoving activity at the site on August 22 and did not cease work until after October 1.

In the consent order that the EPA eventually worked out with Miguel, the EPA notes that the wetlands "abut a perennial stream ... which is a tributary to the Pacific Ocean, which are all 'navigable waters' and 'waters of the United States'" under the federal Clean Water Act. Miguel's work resulted in "earthen and biological materials, such as dirt, rocks, sand, and vegetative matter," being placed in the water and wetlands. "By

discharging dredged and fill material into waters of the U.S. without a ... permit, [Miguel] has violated and continues to violate" Sections 301(a) and 404 of the Clean Water Act.

The consent order, signed by Miguel and effective on October 30, requires him to submit a draft restoration plan within 30 days of that date. Upon approval of the plan by the EPA, Miguel is to "obtain all the necessary and applicable federal (e.g., Corps authorization), state or local permits to conduct site wetland restoration activities described in the plan." In addition, he is required to "obtain written consent from the current landowners to conduct such work on the site." The restoration work is to be completed within 90 days of the approval.

Should Miguel not be able to obtain the landowners' consent, or if he does not submit the required restoration plan, or if the EPA does not approve his plan, then he needs to prepare a mitigation plan. That plan, the consent order states, has to provide a "3:1 replacement to impact ratio" for the impacted wetlands – in other words, given that Miguel disturbed a quarter-acre of wetlands, he would need to provide mitigation for three-quarters of an acre of wetland loss. That could take the form of restoring wetlands elsewhere in the Waialua Stream watershed or require the purchase of mitigation credits "at a qualified mitigation bank."

Miguel told *Environment Hawai'i* that Alan Matsuda, an engineer on Maui, helped in preparing a restoration plan and that he did submit a plan by the deadline. At press time, Miguel and Mapel said EPA had not informed them that the plan had been approved.

In its press release announcing the consent order, the EPA's Mike Stoker, administrator for the agency's Pacific Southwest Region, stated: "Wetlands have a unique ecological importance on the island of Moloka'i and must be protected. Healthy wetlands help filter stormwater, create sustainable habitats, and buffer communities from flooding."

Mapel agrees, but adds, "In this case, the unhealthy and unmanaged wetlands have led to flooding, erosion, and ultimately reduced stream flow, which is not sufficient to blow out the sand plug."

An Altered Channel

Mapel expressed frustration over the difficulties she and Miguel have experienced in their attempts to keep the stream flowing to the ocean by clearing a channel through the sand bar and dislodging debris that has been caught by the bridge.

"The flooding has been going on a long time," she said. "For years, Chucky and I worked every agency. Everybody said it's not their kuleana."

More than a year after Miguel tried to divert the stream, "it's filled up with rocks already," Mapel said. She asked the DOH to revisit the site, but no one has yet come.

"The stream used to go straight at one time," she said. "Now, every storm, it gets worse," with the water taking huge chunks out of the land in the curve of the bow.

U.S. Geological Survey maps of eastern Moloka'i bear out the claim of Mapel and Miguel that the natural channel of the stream has changed. The 1983 quad map of the area shows the stream entering the ocean practically perpendicular to the coast and the highway. There is no oxbow.

Today, the curve in the stream just mauka of the bridge is pronounced and the area where the channel goes under the bridge has shifted sharply to the north and east.

Mapel identified no shortage of contributing factors: the Java plum trees that have taken over areas that used to be carefully tended taro patches; the trails created by deer that then become high-



PHOTO: COURTESY OF DEBRA MAPEL

Waialua Stream flooding the Kamehameha V Highway during Hurricane Olivia.

Continued to page 7

BOARD TALK

Board Approves Acquisition Of Ahupua'a in East Moloka'i

The state's purchase of the 800-acre Pua'ahala ahupua'a in East Moloka'i has been years in the making and is a key part of a fencing project aimed at protecting some of the wettest native forest that feeds the island's sole source aquifer.

In 2015, the state Board of Land and Natural Resources authorized the contribution of about \$623,000 from the state's Legacy Land Conservation Fund toward the purchase. Last November, with additional funding from the U.S. Fish and Wildlife Service, the board approved the acquisition of the lands from Seattle-based K&H Horizons Hawai'i for \$3.19 million.

But it's not a done deal, yet.

Some of the state's efforts in recent years to purchase private lands with agricultural or conservation value have been problematic. The state Agribusiness Development Corporation has been grappling with a wide range of unauthorized uses—including longstanding encroachments along bordering properties—on lands it bought from Dole Foods in Central O'ahu. And

the Department of Land and Natural Resources was surprised last year to find out it had purchased land in 2018 that it already owned.

To help avoid those kinds of headaches, the Department of Land and Natural Resources' Land Division and the Attorney General's office assisted the Division of Forestry and Wildlife (DOFAW) in conducting due diligence on the Moloka'i purchase.

At the board's November meeting, land agent Ian Hirokawa reported that there are kuleana parcels within the property. He said that once the purchase of the 800 acres is completed, the state will have the right to force the sale of those kuleanas, but it does not intend to exercise that right.

A Phase 1 Environmental Site Assessment done in 2018 revealed some concerning environmental conditions on the makai portion of the property, including lead and asbestos in two abandoned homes and buried trash, according to a DOFAW report to the board.

K&H paid more than \$270,000 for

testing and partial cleanup of the sites last year.

"The sampling results at one site did indicate lead and mercury levels above the [Department of Health Environmental Action Levels] and solid removal (20 tons) was conducted at the site for an area of approximately 400 square feet," the report continues. It adds that although post-remediation contaminant levels were below the Health Department's action thresholds, the seller agreed to hazardous materials indemnification language in the warranty deed to the state.

After the sale closes, DOFAW will remove the abandoned structures and dispose of the lead and asbestos.

DOFAW's report also notes that an abutting property owner has a pigpen and other personal belongings encroaching onto the lands to be purchased, and the division is working with the owner to clear them.

"The acquisition will not close until all encroachment issues are resolved to the satisfaction of both DOFAW and Land Division," the report states.

The Fence

Pua'ahala contains some of the most intact forest in East Moloka'i and harbors many threatened and endangered species, "a

Continued on next page 8

Waialua from page 6

ways for dislodged rocks and sediment; the high tides, higher king tides, and the rising sea level that wash sand into the stream mouth; and, not least, people who deliberately toss cut trees and other debris into the stream.

"The waterway isn't maintained," Mapel said.

A spokesperson for the state Department of Transportation was asked if the DOT had any responsibility to keep the stream clear as it passes under the bridge. She stated that the bridges and culverts on state roads are checked before approaching storms and also on twice-a-year inspections. If residents notice the sandbar clogging up flows at the stream mouth, they can ask the DOT to dredge it, she said.

In the meantime, the tides and storms continue to bring sand up the channel. In late December, it flooded again, Mapel said. "Chucky and Jules were over there with their shovels trying to open the sand plug on Christmas morning."



More to Come?

The Hawai'i Water Code requires permits be obtained for any work that alters a stream channel.

But as of press time, the Commission on Water Resource Management, which is responsible for investigating possible infractions and enforcing the Water Code, had not brought any enforcement action against Miguel.

A.J. McWhorter, a spokesperson for the Department of Land and Natural Resources, to which CWRM is administratively attached, said the agency "is planning to meet with the Department of Health's Clean Water Branch in January to discuss and understand the situation, particularly with regards to the EPA's actions, and to assess its own follow-up actions."

The 2018 diversion is not the first time that Miguel has come to the attention of CWRM for his work in Waialua Stream.

Teixeira's inspection report includes this note: "On November 8, 2018, the Department of Land and Natural Resources provided the DOH-CWB with an investigation report that was conducted on March 4, 2010, in response to an alleged river diversion of Waialua Stream. The investigation report documented that Mr. Charles Miguel cleared land with a bulldozer with the intention of returning Waialua Stream to its original flow."

When asked about this, Miguel told *Environment Hawai'i* that he did "clean" the stream on the ocean side of the bridge a while back, but was never cited for that.

Mapel said that when she and Miguel were digging the ditch that is now the subject of so much agency attention, DLNR staff from its Division of Conservation and Resource Enforcement were actually on site. DOCARE officers informed Mapel and Miguel that they saw no problem with the work being done, since it was on dry land and did not involve any stream diversion.

— Patricia Tummons

Board from page 7

few of which we thought were extinct on the island. ... There's a lot to protect and a lot to lose," said Stephanie Dunbar Co of The Nature Conservancy of Hawai'i (TNCH).

TNCH has been assisting DOFAW with the Pakui fence construction project, which has already begun on lands outside Pua'ahala.

The project will span eight ahupua'a, protect about 2,000 acres of forest, and has received state funding of about a million dollars. According to an environmental assessment for the project, "Hunt sweeps and trapping will likely be the primary actions used to control ungulate numbers within the fence."

Maui Land Board member Jimmy Gomes asked Dunbar Co about the public sentiment toward the fencing project, given that some residents feel they have a right to freely hunt in the mountains.

"This is why this particular project took years of outreach. This was not light. This was the first time the watershed partnership [program] was doing conservation in East Moloka'i. The community wasn't as familiar with our work. There was a lot of trust-building, a lot of community meetings," she said.

With regard to gathering rights and hunting, she said very little hunting actually occurs in the area to be fenced because it's so steep. "Most of the hunting occurs below the forest line," she said.

Even so, the EA points out that hunters will actually be allowed to access the fenced area via "step-over gates" at locations determined by the community and the East Moloka'i Watershed Partnership. "Additionally, the strength and rigidity of the proposed hog panel fence material will allow users to climb over it with relative ease. The intent of the project is to protect the area's native forests, which have a direct and profound link to Hawaiian culture and health, not to keep users out," it states.

Land Board chair Suzanne Case pointed out that there is a distinction between hunting and gathering rights.

That being said, Land Board member Sam Gon, who is also a senior scientist for TNCH, told Dunbar Co that the steep slopes look like rough country to try to build a fence.

"It is," she replied, adding, "I made it a point to be on every single fence-route survey. So I can say, sitting here today, that it is doable. I do recommend spiked tabs."

Makai Lands

In addition to valuable native forest, K&H's lands also include Paialoa freshwater pond, the largest on the island. DOFAW's report suggests that the pond, which provides habitat to endangered waterbirds, including the ae'o (Hawaiian stilt), the 'alae ke'oke'oe (Hawaiian coot), and 'alae 'ula (Hawaiian moorhen), could

eventually be designated as a state wildlife sanctuary.

As part of the purchase, K&H has asked for the mutual termination of a lease it acquired in 1991 for submerged lands in the area that had been slated for development for decades.

In 1969, the Land Board granted a Conservation District Use Permit and a lease to the Pua'ahala Company for 108 acres of submerged lands for a marina development that was to include hotels and condominiums. Some dredging occurred the following year, with the material being used to fill part of the Paialoa fishpond.

The lease was later transferred to K&H, which had more modest plans, but no marina was ever built.

According to DOFAW's report, the Land Division is fine with the lease termination so long as the area is returned in a satisfactory condition.

At the Land Board's meeting, Gon asked DOFAW's Katie Erback if there were any plans to restore the fishpond after the sale goes through.

"Not yet, but we're going to talk to the community about it," she replied.

Dunbar Co, who was raised near Pua'ahala, added that community members vividly remember the failed development effort in the 1960s "and it's in large part because of this history that the community is supportive of this acquisition and to do restoration."

(See our September 1995 "In the Conservation District" article for more background on the failed development efforts. It's available for free at www.environment-hawaii.org.)



Purchase Protects Waimea Watershed

On December 30, the DLNR and the Trust for Public Land announced that the state had completed the acquisition of 3,716 acres of the upper Waimea watershed on O'ahu from Dole Food Company. The purchase ensures the "protection of an entire watershed and nearly the entire ahupua'a, from the Ko'olau summit to Waimea Bay," a media advisory stated.

The Land Board had approved the deal on October 25 and authorized public hearings to add those lands — which provide habitat for rare native plants and animals

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Pua'ahala ahupua'a, East Moloka'i.

— to the Pupukea-Paumalu forest reserve. (See our November 2019 Board Talk for more background.)



Non-Profit's Kane'ōhe Bay Tours Prompt Boating Rule Changes

At the Land Board's November 8 meeting, the DLNR's Division of Boating and Ocean Recreation (DOBOR) received approval to hold public hearings on rule amendments that would delete a section that seems to exempt educational institutions and non-profits from limitations on commercial activities in Kane'ōhe Bay.

Kama'aina Kids, a non-profit organization that conducts educational programs for children throughout the state, has for decades been taking students onto the bay, teaching them about ocean safety and ecology, among other things. The organization has also held a lease since 2010 to manage He'eia State Park, which overlooks the bay.

While many in the community have praised the group's work, they have also expressed concern in recent years that its activities have crossed over into commercial use.

In the 1990s, to address the over-commercialization of the bay and adjacent harbor facilities, the Legislature assembled a task force of various stakeholders to create a master plan that would inform the creation of administrative rules governing activities on the water.

Included in those rules were two subsections — p and q — that have become problematic, in light of how Kama'aina Kids has been advertising, pricing, and operating tours on the bay:

Subsection p caps the level of commercial use to what was occurring in 1993, and subsection q states, "Activities conducted by a bona-fide educational institution or an organization which is registered with the State and classified by the Internal Revenue Service as a not-for-profit ... organization shall not be subject to the restrictions of subsection p, but shall operate only in accordance with a permit issued by the department pursuant to [Hawai'i Administrative Rule] chapter 13-231 [relating to small boat harbors] or chapter 13-256

[relating to Kane'ōhe Bay] or both."

Kama'aina Kids' attorneys and staff have argued that subsection q allows the organization to market kayak and sailing tours to tourists in Waikiki and offer \$130 adventure packages — including transportation and lunch — under the name Holokai Kayak and Snorkel Adventures, so long as the charge for the ocean-related part of the tour covers only labor and fuel costs.

DOBOR, however, disagrees and has proposed deleting the subsection.

After rules based on the master plan were adopted in 2011, "it was later found that there was an inadvertent error. The result led to a misunderstanding on the non-profit permit. There is none. The intent was not to create a separate type of permit," DOBOR's Meghan Statts told the board during her presentation on the proposed rule change.

Representatives from Kama'aina Kids, not surprisingly, opposed it.

Andy Carre, who manages the park

"With so many persisting problems with this day and age, with pollution and climate change, [it's] all the more reason we want the ability to offer programs to teach."

— Andy Carre

and oversees Kama'aina Kids' activities in Kane'ōhe Bay, explained to the board that the tours his organization sells under the business name of Holokai Kayak and Snorkel Adventures provide much of the revenue that funds its care of He'eia State Park and its educational programs.

"With so many persisting problems with this day and age, with pollution and climate change, [it's] all the more reason we want the ability to offer programs to teach. ... Kama'aina Kids has been able to operate under that subsection q," he said.

At a Land Board meeting in May, while seeking an administrative hearing on DOBOR's decision not to renew Kama'aina Kids' commercial use permit for its tours, CEO Raymond Sanborn explained that the tours are sold in Waikiki under Holokai Kayak and Snorkel Adventures because nobody would pay to go on a tour by a company called Kama'aina Kids.

He said that if DOBOR prevents the organization from selling those tours, it stands to lose \$300,000 a year, all of which funds the He'eia park management. Carre later added that but for the group's responsibility to care for the park, the paid tour

program would not exist.

Attorney Greg Kugle, who represents Kama'aina Kids, told the Land Board at the November meeting that the organization had been discussing the scope of its activities on the bay with DOBOR since 2016. They disagreed over what the rules allow and the agency ultimately issued the organization a cease and desist letter.

In a February 27 letter to Kama'aina Kids, DOBOR stated that it would not be renewing the one-year commercial use permit it had granted in 2018 because Holokai "conspicuously advertises and operates commercial tours for adults and minor visitors. We have spoken numerous times regarding this issue. Despite this, Holokai Adventures continues to advertise and to operate its commercial tours at commercial for-profit market rates, and thus by definition in excess of the charges allowed under the permit. ... [C]harges for the commercial tours are limited to direct operating costs for the tour. KAC [aka Kama'aina Kids] has continued to circumnavigate the rules

by separating the price for its tours between land and sea activities." Holokai charges \$100 for the land-based part and \$30 for the guided ocean tour.

"This is not a legitimate pricing scheme. The total costs for KAC's commercial activities still exceed the allowable charges for labor and fuel," DOBOR's letter stated.

Last May, the Land Board denied a request for an administrative hearing on the decision not to renew the permit. Even so, it appears that a contested case hearing may be held anyway, according to Kugle. (The DLNR did not respond to questions about how or whether a contested case hearing had been granted by the board.)

Despite not having a permit anymore, Kama'aina Kids is still selling tour packages for the bay on the internet. Kugle told Land Board chair and DLNR director Suzanne Case in May that the tours would continue to be sold "until we get due process."

At the November meeting, Kugle argued against DOBOR's proposed rule change, and said subsections p and q and how they relate to Kama'aina Kids' activities will be central to the pending contested case.

"The proposal before you to drop [section] q out while that is specifically a significant issue in contention in this

Continued on next page

soon to come contested case hearing is, in my opinion, just an effort to kind of level the playing field, to change the rules midstream. ... You can't just change the rules in the middle of the contested case. I think that the only reason for targeting subsection q is to target Kama'aina Kids," he said.

Case explained that Kama'aina Kids' stance that the rules exempt it from restrictions on commercial use is problematic. "You could have jet skis on the bay and it would not be restricted," she said.

"I don't know because that's certainly not what Kama'aina Kids does," Kugle replied.

"Could a non-profit run commercial tours and use the money to fund its non-profit business?" Case then asked.

"I'm not a tax lawyer. I recall when Kamehameha Schools was under scrutiny by the IRS, they cut out some of their commercial entities such as the Royal Hawaiian Shopping Center and other things, which clearly would have threatened their non-profit status," Kugle said.

Carre added that subsection q was historically the justification for Kama'aina Kids' continuous receipt over the years of Ocean Recreation Management Area (ORMA) decals for the 152 boats it uses on the bay.

Board member Chris Yuen pointed out that the ORMA rules prohibit jet skis and parasailing on the bay, so those activities shouldn't be much of a concern. With regard to subsection q, he was flummoxed.

"Certainly, you can have a legitimate non-profit have an educational tour and charge people money to go on it to cover your expenses and the people's salaries. You can also use this as a business model where you, instead of having business, you have a non-profit and you pay yourself to be the head of a non-profit. I'm not saying that's what you're doing. I think that's the q loophole they're trying to close up," he told Carre.

Joe Pickard, a commercial operator on the bay since 1989, was also on the task force that drafted the master plan. "I know all about what happened. I was the one who helped write that language about the non-profits. ... The commu-

nity had had enough. Some companies were taking 300 people a day on tours," he said.

The task force documented all of the commercial uses on the bay at the time, he said, adding, "At no time, ever, was Kama'aina Kids ever considered a commercial operation. They were operating from Kokokahi [another site along the bay]. ... All they were doing was taking out kids out to learn how to sail."

With regard to the use of the bay by non-profits at the time, "At no time was any of these people bringing in tourists from Waikiki. At no time were any of these activities advertising themselves on as commercial operations on the internet.



Kama'aina Kids has held the lease to manage He'eia State Park since 2010.

At no time did they have brochures that they were distributing. At no time did they have buses or vans coming in from Waikiki. So they were not considered commercial operation. They were simply a community service organization and all they were doing is, if someone wanted to go on the bay for a certain purpose that met the community's non-profit needs, so be it. So we inserted that language in the master plan with the intent of not preventing people like native Hawaiian Civic Clubs or the canoe clubs or Polynesian Voyaging Society from using the bay as a resource," he continued.

He argued that the intent of subsection q was not to allow non-profits to conduct commercial activities and said he supported DOBOR's proposal to remove it.

"If not, everyone's going to do it and it's going to destroy the bay," he said.

He added that there does need to be some kind of language in the rules that protects legitimate non-profits.

"Would you draw a bright line on charging people to go out on the water as how we view commercial versus non-commercial?" Yuen asked.

Pickard replied that if the Polynesian Voyaging Society ran a program at Kualoa Beach Park with Windward Community College and they charged students to participate, "if that's construed as charging, I'm ok with that and I think the community is ok with that. But if someone goes on the internet and advertises and has brochures in Waikiki and they're saying, 'Come out and ride our kayaks on the bay,' that is definitely commercial activity and I think it's not right."

DOBOR's Statts said that there are other subsections in the rules that allow commercial users to conduct educational tours without those passengers counting toward their daily limits. However, she said those rules make it clear that the companies cannot charge for more than fuel and labor in those cases.

Board members asked how educational activities by non-commercial organizations would be allowed within the bay.

"What is the bright line?" Yuen asked again. "I can see legitimate programs that involve payment of money.... I can also

see we can create a loophole we can drive a tour bus through," he said.

Statts said that was a hard question to answer. Other than issuing commercial use permits to govern activities on the bay, she said her division has worked with the Polynesian Voyaging Society and schools on specific events. For those, DOBOR has issued a marina event permit that covers a specific amount of time.

"If you're looking for some type of permit that we would issue year-round ... we don't have that," she said.

Given the complexity of the issue and its history, board member Sam Gon said he thought the best way forward was to take DOBOR's proposed rule changes to public hearings "and see about trying to streamline the history of change regarding rules in Kane'ohe Bay."

The rest of the board agreed. — *T.D.*

Climate Commission Issues Guidance On Amending Shoreline Setback Rules

On December 23, the Honolulu Climate Change Commission approved guidance on how the Department of Planning and Permitting (DPP) should update the city's shoreline setback ordinance, which has not been significantly amended in a decade.

The ordinance — which Matt Gonsler of the Honolulu Office of Climate Change, Sustainability and Resiliency calls a “blunt tool” — currently requires setbacks of 40 feet. For shallow lots, setbacks can be as narrow as 20 feet.

Unlike the ordinances for Kaua'i and Maui counties, Honolulu's does not take into account erosion rates or, in any way, recognize that shorelines are dynamic. None of the counties' setback ordinances acknowledge the potential effects of climate change, although that may soon change.

The DPP was already in the process of amending the setback ordinance, but Mayor Kirk Caldwell last year asked the commission to provide some guidance. Over the course of meetings in November and December, the commission concluded that the ordinance should, at the very least, include a background section on climate change and sea level rise.

Because of the near-constant stream of new information regarding sea level rise, climate change, and the like, the commission also recommended that the DPP be required to revisit and amend the ordinance every five years and be provided the resources to do it.

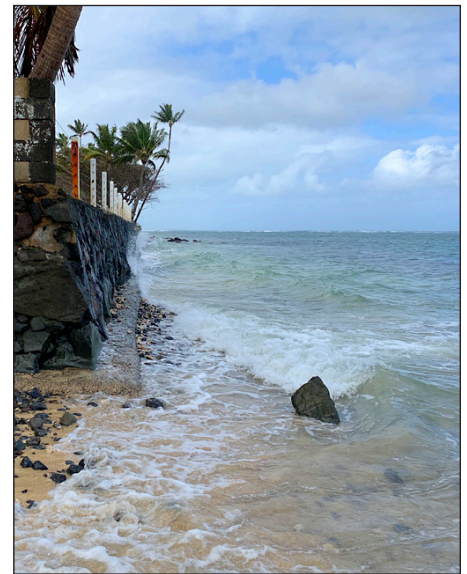
Maui County is also in the midst of updating its shoreline setback ordinance and has proposed adding a provision to allow setbacks to be based on erosion hazard line maps developed as part of an online supplement to the state's December 2017 Sea Level Rise Vulnerability and Adaptation Report. The maps, available on the PacIOOS viewer and hosted by the University of Hawai'i, allow users to see the extent of various types of flooding under different sea level rise scenarios. The red erosion hazard line on the maps, which is what Maui County proposes to use, indicates where erosion-related flooding will reach under a 3.2-foot rise in sea level.

The Honolulu Climate Change Commission has proposed that the city also consider the red erosion hazard line as one of multiple criteria for determining setbacks on O'ahu. Historical erosion rates, lot depth, and regional physical and ecological characteristics should also be considered, the commissioners found.

The commission also recommended that the city revise how it grants setback variances, since they have allowed for shoreline hardening that has shrunk beaches across the state. Commissioner Chip Fletcher had originally recommended that “nowhere in [the ordinance] or its rules should there be an allowance for shoreline hardening,” except for places such as airports and harbors where, presumably, hardening either won't further degrade the shoreline or is necessary to protect critical infrastructure.

“We are addicted to seawalls. If you allow the addict any sort of latitude, they will go back to the drug,” Fletcher said in defense of his recommendation.

Commissioner Rosie Alegado, however, felt the language was too prescriptive and suggested softer language that merely suggests that allowances for shoreline hardening be limited to coastal segments with certain physical or ecological characteristics. The commission ultimately



Seawalls along Kamehameha Highway in windward O'ahu.

supported the softer language.

But before doing so, Fletcher expressed his concern that anything in the guidance document that has a loophole will be exploited by people opposed to changing the setback.

Alegado and commission chair Makena Coffman pointed out that DPP will be writing the ordinance amendments, not the commission. “We're just guiding the ones making the amendment,” Alegado said.

Fletcher, who has tried to assist Maui County in addressing the pushback it's received on its setback proposals, replied, “You don't know what happens when you change a setback. They will find any little

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loophole and they will exploit it. It's what lawyers are paid to do."



Takings

If Maui County succeeds in adding to its ordinance the red erosion hazard line as a basis for shoreline setbacks, some setbacks will be much larger in many areas, and some will be smaller, according to a county report.

In those areas where setbacks would increase, some have argued that would be an unconstitutional taking of private property.

The county Planning Department has countered that current rules include provisions that ensure lots will maintain a minimum buildable depth and also provide an opportunity for landowners to request an amendment to the erosion hazard line. "These will remain. Corporation counsel determined in 2003 that these types of provisions would NOT lead to any takings, and none have been asserted in court," a department web page on the proposed ordinance changes states.

To those who still complain that the reduction in buildable area as a result of increased setbacks would constitute a taking, the county has this to say: "Planners understand that courts interpreting the relevant law look for a very dramatic to severe, if not full, decrease in property value before determining there has been a regulatory taking." The ordinance will still allow a landowner to build a single family residence, "even if maybe smaller and more mauka than what might have been previously allowed. Such lots retain significant residential use and monetary worth given highly valued proximity to shoreline," the webpage states.



A Blind Spot?

Around the state, countless structures, or portions thereof, that were legally built on private properties are encroaching onto the public beach as a result of coastal erosion and/or sea level rise. But rather than use its limited staff to hunt those encroachments down and to get their owners to either remove them or pay the state fair market value for a non-exclusive easement, the Department of Land and Natural Resources' Land Division generally pursues only those cases that come to its attention via the shoreline certification process.

Counties currently require a state certified shoreline to determine how far inland a property owner can erect a structure. Both methods for determining shoreline setbacks on Maui — using the annual erosion hazard rate or average lot depth — require a certified shoreline, which is set at the highest wash of the waves.

That may no longer be the case if proposed amendments to the county's shoreline setback ordinance are approved.

To account for the likely effects of sea level rise, the county administration has proposed adopting a method that uses an erosion hazard line adopted by the state Climate Change Commission to establish setbacks.

Certified shorelines would only be required for owners using lot depth to establish their setbacks.

Should the county council include the red erosion hazard line as a method for determining setbacks, the DLNR's Land Division says, that would likely inhibit the department's ability to track encroachments on state lands, "as most of the shoreline encroachments are identified through the shoreline certification process."

The division did not say whether or not it was concerned about the rule change creating a blind spot on Maui with regard to encroachments. — T.D.