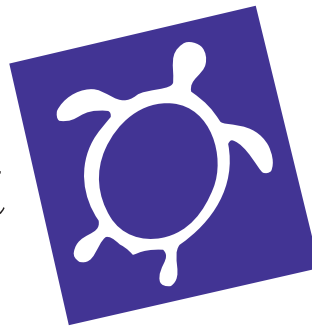


# Environment



# Hawai‘i

*a monthly newsletter*

## *Getting Rights Right*

**O**opsie! Two days after the state Commission on Water Resource Management issued its decision in a contested case over Maui water rights, and one day after claimants to water intimated they might well sue over the water allocations in that 362-page decision, the commission backtracked.

In what is perhaps the longest “errata” in history, commissioners reshaped the allocations, bringing them more in line with what had been tentatively agreed to by all parties years earlier.

However clumsily it was achieved, the final outcome lays to rest a dispute over Na Wai Eha – the four major streams of Central Maui – that goes back nearly two decades.

It’s far from the end of legal battles over other Maui water sources, but it’s a giant step forward.

## Commission Tweaks Na Wai Eha Decision, Shrinking Mahi Pono’s Water Allocation

**L**ate last month, the Commission on Water Resource Management issued its decision and order in a contested case over the use of water from four major Central Maui streams. A few days later, it issued a drastically amended version – described as “errata” – after the petitioners in the case warned of a possible court appeal if certain findings regarding Mahi Pono, the largest prospective water user, weren’t changed.

Nearly 20 years ago, to benefit native ecosystems and struggling area farmers and residents with appurtenant water rights, the community groups Hui o Na Wai Eha and the Maui Tomorrow Foundation petitioned the commission to amend the interim instream flow standards (IIFS) for Waiehu and Waikapu streams and Waihe‘e and Wailuku rivers to reduce the amount of stream water diverted by the sugar plantation-era ditch

system now operated by the Wailuku Water Company (WWC).

In April 2014, after slogging through public and contested case hearings and court appeals, the parties to the contested case reached an agreement on a new set of IIFS for the four streams that required more than 20 million gallons a day (mgd) to remain in them. Because the Na Wai Eha watershed is a designated surface water management area, the commission subsequently received applications and held evidentiary hearings to determine who would receive permits for offstream uses of whatever water was available once the IIFSs are met, and how much water each permittee would be allowed to draw.

In November 2017, hearing officer Lawrence Muike issued his proposed findings of fact, conclusions of law, and

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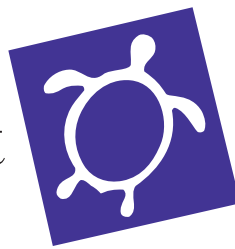


PHOTO: USGS

A diversion intake on Waikapu Stream, Maui.

# Environment

Volume 32, No. 1



# Hawai'i

July 2021

## NEW AND NOTEWORTHY

**So Long, Skeeters:** The multi-agency effort to save a number of native forest bird species from imminent extinction got a boost June 22, when the state Board of Agriculture unanimously approved a permit allowing the importation of 25,000 male *Culex quinquefasciatus* mosquitoes that have been inoculated with a foreign strain of the *Wolbachia* bacteria, ensuring that their mating with local female mosquitoes won't result in any offspring.

Releasing the mosquitoes into the wild here is intended to suppress the *Culex* mosquito populations in forests where native honeycreepers are struggling to survive, as temperatures climb and disease-carrying mosquitoes infiltrate the birds' habitat. Those mosquitoes are vectors for avian pox and avian malaria, which threaten to wipe out the critically endangered 'akikiki and 'akeke'e on Kaua'i, and the kiwikiu and 'akohekohe on Maui.

University of Hawai'i at Manoa professors Floyd Reed and Matthew Medeiros requested the special permit from the board to import

the mosquitoes, conduct laboratory and field research on them, and eventually release them into the wild. The mosquitoes, originally collected from Hawai'i, are currently kept at Michigan State University and the University of Kentucky.

The Wolbachia technique has been used successfully outside Hawai'i to suppress mosquito populations and protect humans from mosquito-borne diseases such as dengue and Zika.

"We have high hopes it will be as effective here in preventing species extinction," said Michelle Bogardus of the U.S. Fish and Wildlife Service, which is also involved in the effort.

"We are literally seeing forest birds go extinct on our watch and it's just going to continue. ... This [project] is just an absolutely crucial next step for trying to stem that extinction surge," Dave Smith, administrator for the Department of Land and Natural Resources' Division of Forestry and Wildlife, told the board.

The Department of Agriculture has determined that an environmental assessment is necessary before mosquitoes are released for either field research or mosquito control. According to DLNR director Suzanne Case, an environmental review is underway for a broader release anticipated in the future.

For more background on this, see our April

2021 Board Talk item, "Fate of Endangered Forest Birds Hinges On Landscape-Scale Mosquito Control."

**Down with the Devil Weed:** The Department of Land and Natural Resources is beginning the environmental review process for its plan to release a fly that is known to control the highly invasive *Chromolaena odorata*, also known as devil weed.

The weed, discovered on O'ahu in 2011, "aggressively colonizes clearings, wet forests, and agricultural lands, and creates dense monocultures that prohibit other plants from growing nearby. The plant is toxic to livestock, and can be a skin irritant and cause asthma like symptoms for some individuals," according to a recent solicitation for comments from the department.

"Although the weed has only been detected on O'ahu and Hawai'i island, it is expected over time to spread throughout the state as the population on O'ahu is no longer eradicable," it continues.

The agency plans to release the stem-galling fly *Cecidochares connexa*, which has been successfully released in ten countries to control the *Chromolaena odorata*. It is currently working to determine if the fly is host-specific when tested with plants found in Hawai'i. If it's found that the fly won't impact non-target species, the department will conduct an environmental assessment and file permit applications with the required state and federal agencies.

The DLNR will accept preliminary comments on the project at [www.biocontrolhawaii.org](http://www.biocontrolhawaii.org) until July 29.

**Stilt Status:** The U.S. Fish and Wildlife Service has extended the comment period for its proposal to downlist the Hawaiian Stilt, or ae'o, from endangered to threatened. The comment period initially ended on May 24, but in response to a request from the public, the agency has reopened the comment period, which now ends on July 23.

It has also scheduled a virtual public hearing on Zoom for July 7, from 6-8 p.m. preceded by an informational meeting from 5-6 p.m.

### Environment Hawai'i

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### Quote of the Month

*"We are aligned right now. We need to get as much done as we can do right now because of our alignment. ... Climate change and other urgencies compel us."*

— Water Commissioner  
Neil Hannahs on He'eia  
Stream restoration

# Applications for Overgrown Ag Lands Confound ADC Selection Committee

Trying to help meet state food sustainability goals, while facing a lawsuit brought by a former tenant of its lands in North-Central O'ahu, the state Agribusiness Development Corporation is being extra cautious about negotiating new land licenses for hundreds more acres in the area.

On March 4, the ADC solicited applications from farmers and ranchers interested in five parcels in the Whitmore and Mililani areas totaling more than 1,100 acres, although only about half of that land has been classified as usable.

The lands have not been farmed in decades, are overgrown, and in some cases, littered with junk and old cars. Some parcels also lack an onsite water source or easy access.

Even so, the agency received 33 applications, with each of the five areas having at least nine applicants.

The ADC's evaluation committee ranked the top applicants based on their business plans, farming practices, experience, finances and the marketability of their products, with good finances carrying the most weight. The top six applicants were the following:

- 1) Larry Jefts, who already farms hundreds of acres of ADC lands in the area and is a former ADC board member himself;
- 2) Thomas Law, owner of Law Tieng's Farm;
- 3) Tony and Manyone Law, who run Tony Law's Farm;
- 4) Cedar Grove Hawai'i, Inc., a composting company managed by Clyde Kaneshiro, owner of Honolulu Disposal, the largest waste and recycling company in the state;
- 5) Hawaii Sustainable Agricultural Products, LLC, a company incorporated in April of this year, whose agent is Arion Energy, LLC, which has recently established a number of solar farm companies in the state;
- 6) Sila Farms, established in February of last year.

But according to ADC staff, the evaluation committee chose not to finalize its recommendations without further guidance from the agency's board of directors on some of the proposed uses, including solar farms, industrial hemp, and sod.

"The committee also had concerns that the applicants are not fully aware of the conditions of the land and external factors that cannot be overlooked. For example, the applicant who is awarded the Whitmore Agricultural Lands surrounding Whitmore Village must engage and work closely with the community, including but not limited to outreach, and attending community meetings. The applicant must also have a plan to address the theft, vandalism, trespassing, and illegal dumping that occur in these areas. The ADC awarded these lands to a farmer in 2019, but they declined after learning about the history of the property and the challenges they would encounter while developing the land," a staff report states.

"Before making its recommendations, the committee would like some assurances that the applicants who are selected are aware of their roles and responsibilities so there are no misunderstandings and disputes in the future, which may lead to litigation. The ADC will be issuing these larger tracts of land as is, where is, and the operators that the ADC Board selects must acknowledge ADC's terms and conditions," it continues.

Although it was listed clearly on the ADC's advertisement to the prospective farmers that there was no water for some of the parcels, "a lot of these farmers were applying for TMKs [tax map keys] that had no water. There were instances a farmer or business would apply for every single parcel. ... Questions arose whether they were aware with issues with the land," staffer Ken Nakamoto said at the board's June 23 meeting.

In 2019, former tenant Ohana Best, LLC, sued the ADC, claiming that the agency and its executive director, James Nakatani, failed to provide promised irrigation water to the 160 acres the company had planned to farm. This despite the company allegedly spending \$1.5 million to clean and prepare the land for farming. The case is still pending; the state filed its responsive pre-trial statement last month.

To avoid future litigation, committee member Warren Watanabe said he wants to make sure the applicants understand the parcels are being offered as-is.

"My original intent with this committee was to move this as fast as we could, but understanding the difficulties the farmers will face ... we want to make sure the applicants have the ability to follow through," he said.

"I want to see these lands in production, to meet the governor's mandate, to have agriculture be again an economic player across the state," he added.

"It is not as simple as I thought it was going to be," committee member Fred Lau said of the tenant selection process.

With regard to the use of the ADC's lands for hemp production, state Department of Agriculture director Phyllis Shimabukuro-Geiser said it's legal as long as the farmer has a valid license from the USDA.

However, she discouraged approving any applications in which a solar farm was the primary use. If a photovoltaic system is needed to aid in crop production, that might be acceptable, she suggested, but the lands the ADC is offering are of too high quality for just a solar farm.

Board member Mary Alice Evans, who is also director for the state Office of Planning, agreed, as did board member Kaleo Manuel, deputy director for the state Commission on Water Resource Management.

Evans said that in order to double local food production by 2030, which is the state's goal, the ADC can assist by limiting O'ahu agricultural leases to commercial farmers on at least 100 acres, rather than small subsistence-type farmers.

"For people who want to do subsistence farming, there is a lot of land on the neighbor islands. ... The majority of consumers are on this island," she said.

Manuel noted that hemp and sod are not food, although hemp "maybe could become a food product."

Lau explained that the applicant proposing to grow sod would mainly be a food producer. Sod would account for only a quarter of the operation, he said.

The board agreed to take up the committee's recommendations in August.

(For more background of this, see our article published in March, "Agribusiness Agency Explains Reasons Behind Slow Progress in Utilizing Lands.")

— **Teresa Dawson**



*CWRM from Page 1*

decision and order. Two years later, before the Water Commission heard final arguments on Miike's recommendations, Mahi Pono, the Office of Hawaiian Affairs, the Hui, and Maui Tomorrow agreed to a stipulation and order under which Mahi Pono would receive an existing-use water permit with an initial allocation of 9.35 mgd.

The company, which plans to develop diversified agriculture on thousands of acres of former sugarcane land purchased from Alexander & Baldwin a few years ago, would be allowed to draw an additional 1.87 mgd — for a total of 11.22 mgd — if and when a licensed surveyor confirmed that: it had planted 1,850 acres of food crops in the Waihe'e-Hopoi fields before December 31, 2021; it consistently used 4.5 mgd from its Well No. 7 for reasonable-beneficial agricultural use; it had an actual need for the additional water; it developed and implemented a plan to minimize system losses; and it provided information sufficient to prove that the conditions had been met.

In its June 28 decision and order, however, the commission departed from that agreement and chose to issue Mahi Pono a water use permit for 15.65 mgd: 13.5 mgd for irrigation needs and 2.15 mgd for system losses.

The commission had also determined that Mahi Pono could draw 3 mgd from a well — Well No. 7 — and 0.1 mgd from 'Iao tunnel to help meet its total irrigation needs of 16.6 mgd.

Although the commission had decided to allow permittees to draw up to 2,500 gallons per acre per day for diversified agriculture, it did not seem to apply that rate cap to Mahi Pono's needs for the 3,650 acres of its Waihe'e-Hopoi fields. The 16.6 mgd the commission determined Mahi Pono needed for irrigation would mean the company would be using about 4,500 gallons per acre per day on those fields.

In a June 29 press release, Earthjustice, representing the petitioners, called attention to what they believed was an oversight by the commission regarding Mahi Pono's permit.

"We're hopeful that we can work out these important fixes and avoid more twists and turns including appeals," Hui president Hokuao Pellegrino was quoted as saying. He added, "After 17 years of

carrying this case to this point, we can do better for our streams as well as for present and future generations who live and farm in Na Wai Eha."

A day later, the Water Commission issued revisions to its decision and order that drastically reduced what Mahi Pono will be able to draw from Na Wai Eha.

The commission found that the company needed just 9.125 mgd and that its claimed system losses of 2.15 mgd were "excessive and unsubstantiated."

The commission pointed out that WWC's system losses were only five percent of what it diverted. Mahi Pono's was nearly 14 percent of what it would have been allowed to divert under the June 28 decision and order.

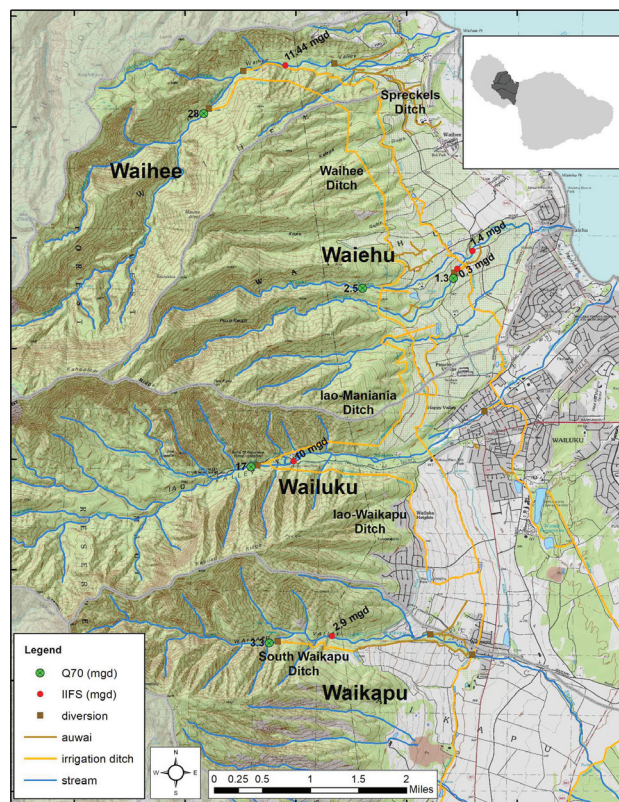
In its errata issued June 30, the commission reduced Mahi Pono's allowable system losses to less than half a million gallons a day. It also recalculated its actual irrigation needs and increased the amount of water it could draw from Well No. 7 to 4.5 mgd, the amount called for in the 2019 agreement.

With the commission's revisions, Mahi Pono's permit now allows for the diversion of just under 5 mgd: about 4 mgd from Waihe'e River and 1 mgd from Wailuku River.

In total, the commission granted 176 water use permits, including Mahi Pono's.

The commission did not change the IIFS for the four streams much from what was agreed to in 2014, and it acknowledged in its decision last month that "there will be times when the offstream permittees will have no water or insufficient water, and times when the instream public trust permittees will have insufficient water and have proportionately lower deliveries. In times of drought even the IIFS will have to be decreased."

"To assist in meeting irrigation requirements during low-flow periods, the commission is supportive of permittees maximizing their reservoir storage ca-



Na Wai Eha.

pacities when stream flows exceed Q50 [the amount of water in the stream 50 percent of the time]. Permittees may be allowed to divert water in excess of their permit allocations in order to fill their reservoirs subject to a stream diversion modification approved by the commission. Permittees may be required to remove siltation to increase the capacity of their reservoirs prior to making this option available to them," it continued.

### *T&C Uses*

Back in November 2019, when the commission heard final arguments regarding Miike's proposed decision and order, the Office of Hawaiian Affairs and the Hui objected to the limits he wanted to place on requests for permits for traditional and customary (T&C) Hawaiian practices, namely taro growing.

Miike had recognized only a fraction of the dozens of T&C permit applications from native Hawaiians wanting to grow taro. He had recommended granting T&C use permits only to people who could prove that prior to 1892, their ancestors used their properties the same way they planned to.

Office of Hawaiian Affairs attorney Pamela Bunn testified that the agency

*Continued on next page*

*CWRM from Page 4*

would be forced to appeal the commission's decision if it adopted Miike's recommendations on T&C permits. She also argued that Miike's recommendation to cap water for T&C uses to one acre also lacked any precedent and should be ignored.

The commission heeded her recommendations in its final decision.

"The commission believes that the origin of traditional and customary practices lies in traditional Hawaiian land tenure which allowed for kanaka to be able to move from place to place and still exercise their kuleana rights as they relocated," an executive summary of the decision and order states.

"The commission holds that T&C rights relate to both the practice and the person. Inasmuch as it is clear that the traditional and customary practice of kalo cultivation was established in the ahupua'a comprising Na Wai Eha prior to November 25, 1892, the commission has recognized applicants who attest that they are exercising T&C rights as a present day ahupua'a tenant and person of Native Hawaiian descent," it continues.

The decision and order concludes that taro growing "existed throughout all four watersheds prior to November 25, 1892, that the practice is related to family needs for subsistence, and that the manner in which the practice is conducted is consistent with tradition and custom. Therefore, existing and/or new water use permits for traditional and customary practices associated with growing kalo are issued in this case to any applicant who qualifies as a Native Hawaiian within the guidelines set forth in *PASH* [a Hawai'i Supreme Court decision regarding access] and who do not intend to grow kalo for a commercial purpose."

Also, rather than limiting T&C uses to one acre as Miike had suggested, the commission capped all permits for taro growing to 150,000 gallons per acre per day, which was the median inflow found in a study of 17 lo'i complexes across the state.

Among the applicants to benefit from the commission's departure from Miike's recommendations was the Hui's Pellegrino.

Back in 2019, Pellegrino had contested Miike's decision not to grant him and his wife, Alana, a Category 1 permit for their current and future taro lo'i.

Under Miike's proposal, T&C uses and general domestic uses, especially drinking water, would have been covered under Category 1 permits and given the highest priority during times of shortage.

Even though the Pellegrinos are native Hawaiian, Miike had recommended that their requested water allocation for taro cultivation be considered a Category 2 permit for those with appurtenant water rights, and a Category 3 permit, which covered new uses not tied to appurtenant rights and would only be honored if there was enough water.

Although the commission's decision and order didn't provide the Pellegrinos with much more water than what Miike had proposed, it did recognize that of the 124,775 gallons per day (gpd) it granted based on their recognized appurtenant

*"The resuscitation of kuleana lands for lo'i kalo is not only to allow individual kuleana to grow kalo, ... but to do so in mutual cooperation and labor with neighboring kuleana."*

— **CWRM**

rights, "123,150 gpd is also considered the exercise of traditional and customary practices."

T&C uses, under the commission's order, would also maintain top priority — along with domestic uses of the general public, the Department of Hawaiian Homelands reservations, and Maui Department of Water Supply water uses — during times of water shortage.

For each stream, the decision and order contains a table that identifies a range of reduced allocations during drought conditions.

"[P]ublic trust water allocations will have priority over other reasonable and beneficial uses. If public trust uses must be reduced, reductions will be allocated proportionally. The commission retains emergency rule-making authority when needed to deal with extreme droughts," it states.

**Next Steps**

While the decision and order established how much stream water each permittee would be allowed to divert, the com-

mission acknowledged that much more needs to be done to implement and enforce those allocations.

Back in November 2019, the commission received testimony that shed light on how difficult it will be to ensure that permit allocations are met and complied with, especially since portions of the ditch system cross difficult terrain and aren't well maintained. What's more, many users served by the ditches managed by WWC and Mahi Pono are unmetered.

Miike had recommended tasking WWC with developing an implementation plan, which the company's counsel, Paul Mancini objected to, arguing that was the commission's job.

In its decision, the commission required all permittees to report their water usage to the commission every month. Those without meters could use a practical method, such as a bucket, to measure how much water they were taking.

WWC and Mahi Pono were tasked with reporting monthly on how much water they delivered, including to ditch or 'auwai systems serving kuleana tenants.

The commission encouraged kuleana users on unlined 'auwai systems to find ways to reduce system losses through lining or piping. It also called on them to work together to maintain their ditches.

In the pre-Mahele period, maintenance of the ditches was a collective responsibility, the decision and order states.

"The resuscitation of kuleana lands for lo'i kalo is not only to allow individual kuleana to grow kalo through traditional practices but to do so in mutual cooperation and labor with neighboring kuleana, and a regulatory approach only solidifies the present focus on one's own kuleana irrigation needs."

It continues, "The commission encourages the kuleana permittees, community groups, and agencies to assist in the development of a community or hui style of management for these kuleana 'auwai to develop the community-sharing system that is needed to revive Na Wai Eha as the premier wetland kalo producer not only on Maui, but throughout the State."

— **Teresa Dawson**



# Water Commission Orders Honolulu BWS To Take Steps to Restore He'eia Stream

The state Commission on Water Resource Management last month ordered the Honolulu Board of Water Supply to complete a feasibility study and preliminary engineering design within two years for a new bulkhead in its Ha'iku Tunnel in Windward O'ahu.

As an interim measure, the commission also ordered the BWS to cut the amount of impounded dike water it takes from the tunnel down to 0.3 million gallons a day by August 15.

"We want a yes or no in two years [on the bulkhead]. If it's a no, then we need to take appropriate action to protect instream standards," said Water Commission hydrologist Ayrton Strauch.

Commission staff has already proposed setting the interim instream flow standard for He'eia Stream at 1.77 mgd. Currently, during the summer months, the stream only has 0.3 mgd per day flowing in it, according to Strauch.

If the bulkhead is deemed feasible, the commission voted to require the BWS to complete construction within three years.

## Priority Uses

The commission's goal with these orders is to increase flow in He'eia Stream. Over the past two decades, non-profit groups have restored acres of lo'i kalo (taro patches) and an ancient Hawaiian loko i'a (fishpond) that rely on the stream's flow.

"That's a lot of time, energy and resources, and funding that have been put towards the restoration of an ahupua'a.

What we want to see is 100 percent return of water ... to He'eia," Paepae o He'eia executive director Hi'ilei Kawelo told the commission last month via video recorded testimony.

While standing in the pond itself, she showed how, in the past, they used to let a trickle of water from the stream enter the fishpond through a gate, leaving the rest to flow into the ocean. In recent months, however, stream flow has dropped so low that they've boarded up the gate, regardless of how badly the pond's fish need the freshwater.

Because the ecosystem needs that water to flow into the ocean, as well, it would be irresponsible for Paepae o He'eia to lift the boards that are keeping the water in the stream, she said.

As a result, "the health of the loko i'a is hampered by the lack of freshwater. ... Freshwater is the engine that drives productivity," added Keli'i Kotubetey, assistant executive director of Paepae o He'eia.

They and other staff from the groups working in He'eia have testified that the fishpond is too salty and stagnant, and that despite clearing acres of thick mangrove to allow stream water to enter the 'auwai, flow from the stream still doesn't reach all the lo'i that have been restored so far. It was "incredibly heartbreaking," testified Nicholas Reppun, a farmer with the group Kako'o 'O'iwi, which is restoring and expanding the lo'i just Mauka of the fishpond.

Under the Hawai'i constitution, maintaining waters in their natural state and the use of water in the exercise of

native Hawaiian and traditional and customary rights are protected, public trust uses that would seem to take priority over watering golf course greens.

As Strauch has repeatedly pointed out, some of the largest users of freshwater in the island's Ko'olau Poko district are golf courses. The largest user by far is the Kane'ohe Marine Corps Base, which also has a golf course.

Many of those large users, including the base, receive water from the BWS's 272-foot elevation system, and not from the 500-foot system that draws water from sources that would otherwise feed He'eia Stream. Even so, Strauch pointed out that as of March, the BWS was dropping 0.89 mgd from its 500-foot system into its 272-foot system, which receives water from a variety of sources.

Strauch suggested that if the Marine base went back to using recycled water on its golf course, that would lessen the need to transfer so much water from the 500-foot system, and, therefore, lessen the need to take water from sources that feed He'eia Stream.

"Trying to rectify how we manage sources with permits and end uses that may not be consistent with protecting public trust needs is challenging and we don't have all the tools that we might want, but this is a really good first step," he said.

## Finding Solutions

BWS manager Ernie Lau supported the notion of getting the Kane'ohe Marine Base to return to watering its golf course with recycled water. And BWS program administrator Barry Usagawa said he had recently spoken to base personnel about it and reported that it likely wouldn't happen until sometime after the end of the year.

He pointed out that the state Department of Health restricts the use of R2 water — which is what the base's wastewater treatment plant produces — and requires a 500-foot buffer between where it is used for irrigation and the nearest homes.

Because the base wants to spray its green spaces with the recycled water, it's planning to plant a tree buffer around the homes. Usagawa said that the base planned to award tree-planting contract toward the end of this year.

*Continued on next page*



He'eia fishpond.

*He'eia from Page 6*

He argued that it would be simpler to find a solution within the 500-foot system, rather than try to force conservation measures outside of it.

He noted that in the 500-foot system, the largest water user is the state hospital in Kane'ohe, which being renovated but is planning to reopen in two months at a larger capacity.

It is using 23,000 gallons a day during construction. At full buildout, he said, it will use 200,000 gallons per day.

Anticipating that the Water Commission would require it to reduce its withdrawal of water from the Ha'iku Tunnel, the BWS has recently reduced its take from about 1 mgd to 0.5 mgd. The reopening of the hospital will all but erase that progress at the same time the commission is asking the BWS to bring its tunnel withdrawals down to 0.3 mgd — “a double whammy,” he said.

He added that the commission was asking the BWS to cut back 85 percent of its permitted use for the area. “We question how fair that is, how workable that is,” he said.

As an alternative, he suggested that the state install a pump in an old well on the hospital property and take the hospital off the BWS's system.

That well can provide as much as 720,000 gallons of water a day and would not affect He'eia Stream, he said, adding that the well could serve both the hospital and the adjacent Windward Community College, which uses only 13,000 gallons a day.

“Those are both state properties. Both use Ha'iku Tunnel water. ... We believe the government should lead by example and require the state to put a pump in that existing well. That would help us accommodate the reduction to 0.3 mgd,” he said.

He and Lau admitted that the idea to install a pump in the well was brand new and had not been run by the state Department of Land and Natural Resources or Department of Health, which would need to agree to it.

They also noted that some BWS system operators are concerned that throttling down withdrawal from the tunnel to 0.3 mgd will create pressure changes that may lead to main breaks, especially in Maunawili.

With regard to the commission's

order to install a deeper bulkhead in the Ha'iku Tunnel, which according to the U.S. Geological Survey would restore the storage capacity of the high elevation aquifer, Lau said the BWS agrees that increasing dike storage will benefit the watershed, but explained that installing a bulkhead won't be easy or quick. Just getting workers into the narrow spaces in the tunnel may be difficult and, once construction is done, the board would have to work with the Health Department to ensure that the water is safe to drink before bringing that source back online, he said.

He added that as part of a study of the He'eia watershed, the USGS will begin seepage runs this summer to determine what sections of He'eia stream are gaining and losing.

Fred Reppun, education coordinator for the He'eia National Estuarine Research Reserve (HNERR), had testified earlier in the meeting that he supported the commission going ahead and adopting a new interim instream flow standard of 1.77 mgd for He'eia, rather than relying on bulkheading the tunnel.

“Whether it will increase flow in He'eia Stream is an open question,” he said, noting that summer water levels had dropped despite the BWS's reduction in withdrawals from tunnel. “Regulation of Ha'iku Tunnel alone does not protect the stream,” he argued.

HNERR director Kawika Winter added his concern that forcing a reduction in withdrawals from the tunnel might simply lead the BWS to increase the amount it takes from its wells in the area, which might then affect springs.

Strauch noted later in the meeting that understanding whether withdrawals from the BWS's Ha'iku or Ioleka'a wells will affect streams flow is being studied by USGS. He suggested caution should be taken with withdrawal from wells, adding that the goal of the commission's proposals “was not to take one source off so they can take advantage of another source. The goal was to restore

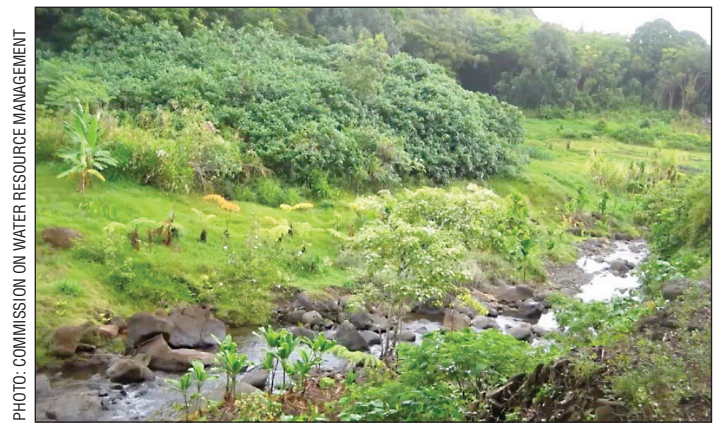


PHOTO: COMMISSION ON WATER RESOURCE MANAGEMENT

He'eia Stream.

stream flow and restore the functionality of the aquifer [and] capacity of the mountain to sustain streams and springs that would feed not only He'eia, but also neighboring ahupua'a.”

Lau, who had recently toured the fishpond and taro fields with the non-profit groups, said that in addition to what the commission was requiring, the BWS wanted to partner with Kako'o 'Oiwī to see how the two organizations can work together to increase conveyance efficiencies.

Water commissioner Neil Hannahs said he understood the BWS needed time — to better understand the watershed, determine whether it was feasible to bulkhead the tunnel, and then construct it. But he urged the BWS to move with alacrity.

He noted that both the Water Commission and the BWS are currently aligned in their holistic approaches to water management. But, he added, “our sense of alignment and philosophy, sometimes these things come and go. ... We are aligned right now. We need to get as much done as we can do right now because of our alignment. ... Climate change and other urgencies also compel us.”

In the end, commission staff committed to reporting back in September on BWS's tunnel withdrawal reduction and its impact on flow, if any; on the agency's progress toward assessing bulkhead feasibility and the engineering report; and on the potential development of alternative water sources, including the state hospital well.

(For more background on this, see our March 2021 cover story, “Commission Pressures BWS To Meet Proposed He'eia Stream Flow Standards.”) — **T.D.**



## Maui Quarry Gets Time Extension From LUC Amid Procedural Questions

For three decades or so – no one seems to be sure of the precise time – a quarry has operated on a rocky slope above Honoapi'ilani Highway near Ma'alaea, Maui. Not until 2006, though, did Pohakea Quarry obtain a state special permit. Such permits are to be granted for uses that are unusual, given the land use district in which the use is to take place (in this case, the state Agricultural District), but are nonetheless reasonable.

The permit, which, since 2011, allows for quarrying on 79 acres of land, expired in December 2019. Under a provision in the corresponding county permit, the quarry could continue operating after that if it had applied for another extension at least 120 days before the expiration date.

And the owner of Pohakea Quarry, Hawaiian Cement, did just that, submitting to the county Planning Department its application for a 10-year renewal of the permit two years ago, in June 2019.

Not until November 2020, however, did the Maui County Planning Commission vote to recommend that the state Land Use Commission grant a 15-year time extension. And finally, last month, the LUC approved the county's recommendation. So after a year and a half of operating without a state permit, the quarry once more has the LUC's blessing.

But the proceeding before the LUC last month and subsequent queries from *Environment Hawai'i* raise questions

concerning the way in which the time extension request was handled at both the county and state level:

- Why and by whom was the 10-year time extension request changed to a 15-year extension – actually, a 16-year extension (2019-2035)?
- Did the county violate LUC rules in submitting its recommendation to the state commission?
- Was the record submitted by the county a “complete record,” as required by law and rule?
- In considering special use permit requests, is the Land Use Commission precluded by law from considering testimony or evidence that is not in the record forwarded by the county?
- How diligent was Maui County in verifying compliance with permit conditions?

### *Untimely Reports*

When the Maui County Planning Department notified the Land Use Commission in July 2019 of the quarry's request for a time extension, the response of its executive officer, Dan Orodener, was critical.

“At this time, we cannot recommend an extension be granted,” Orodener informed the county. “Our records indicate that there may be violations of conditions previously imposed by the Land Use Commission.” The LUC permit contained 23 conditions, including a requirement that the quarry submit

annual progress reports. “The only annual report received by the LUC since the 2006 [decision and order] was submitted on April 2019,” he noted. “The petitioner's progress report from 2006 until now is untimely.”

“As there is significant ambiguity involving compliance with conditions,” he concluded, “we cannot support further extension of the Special Permit in the absence of some evidence demonstrating current and continued compliance with the county-level conditions and the conditions contained in the Decision and Order.”

Addressing the concerns identified by Orodener took some time. When the county Planning Commission finally met in November 2020 to decide whether to recommend to the LUC a 15-year extension of the quarry's special use permit, commissioner Denise La Costa wanted the Planning Department to explain why it took so long for the department to bring the application before the commission.

“Why, when the renewal was applied for in June 2019, did it take until September 2, 2020, for the Conditional Use Permit to be granted [by the Planning Department] and then two months later came to us?” she asked.

Paul Fasi, the county planner overseeing the permit renewal application, responded: “As long as the applicant has an application in process, then they can continue operations, as long as we're processing their permit. And the reason it took so long is because the applicant had to catch up with their compliance reports, so we were kinda waiting for that.”

Fasi went on to say that, despite the lack of timely reporting, the quarry operated in compliance with requirements. “They were compliant throughout,” he assured the commission. “I would not bring this before the Planning Commission unless they had met their compliance requirements.”

The only thing they weren't compliant on, Fasi said, was the reporting requirement, “so they had to catch up and go, you know, a year at a time to catch up, so we were waiting for that, and upon review, based on those compliance reports, they were in compliance the whole time. So, we accept that based

*Continued on next page*



Close-up of yellow-faced bee.



**LUC from Page 8**

on what they told us.”

Although the quarry had applied for a 10-year extension, by September 2020, when the county Planning Department approved the time extension for the conditional permit, the extension being sought was for 15 years. The conditional permit – one of three allowing operation of the quarry (two approved at the county level, one by the LUC) – was specifically for concrete recycling and the use of the scale house and office on the site. Now, planning director Michele McLean informed the quarry's agent, Michael Munekiyo of the planning firm Munekiyo Hiraga, the conditional permit would expire December 15, 2035. (Although McLean's letter refers to a 15-year extension, it is effectively 16 years, given that the previous time extension expired December 15, 2019.)

In the materials forwarded to the LUC by the county in support of the Planning Commission recommendation favoring approval of the time extension, there is no document that explains the change in the duration of the permit. Fasi, the county staff planner, was asked when this change was made, and he referred all questions to Bryan Esmeralda, the planner with Munekiyo Hiraga. Esmeralda had not replied to our questions by press time.

The question was posed to Michele McLean, Maui County planning director. “I believe the discussion of the permit duration was either verbal or by email,” McLean stated in an email to *Environment Hawai'i*. “Nothing relating to this change was included in the MPC's [Maui Planning Commission] staff report package, so it would not have been part of the complete record submitted to the LUC.”

**A Time Crunch**

By statute, the Land Use Commission has just 45 days from the time it receives “the complete record of the proceeding before the county planning commission” to make a decision on it. On April 29, McLean, the planning director, forwarded the county Planning Commission recommendation to the LUC, thus setting off the timer for the LUC's consideration of it.

That same statute, however, requires the county to give the LUC a copy of its decision, “together with the complete re-

cord of the proceeding before the county planning commission,” within 60 days of that decision being made.

With the Planning Commission having voted to recommend the LUC approve the time extension on November 24, the county should have forwarded it to the LUC by late January at the latest.

In an effort to explain the delay in submitting the “complete record” to the LUC, McLean said, “We did not realize that past compliance reports were delinquent until after the MPC had taken action. If we had realized this prior to the MPC meeting, it would not have been scheduled until the reports were provided. For the same reason, the planner [Fasi] stated what he believed was true at the time – that permit conditions had been met.”

Regardless of that apparent lapse, the LUC still was under the gun to schedule a hearing on the county request within the 45-day time frame. The earliest reasonable date was June 9.

When the LUC met that day, it had received just three written comments from the public. Two were from companies that used the quarry's products. The third was from Lucienne DeNaie, representing the Sierra Club, Maui. (Penny Levin of Wailuku also submitted extensive critical comments; however, these were not received until June 10, a day after the LUC met to discuss the quarry permit.)

**An Endangered Species**

In written testimony, DeNaie raised concerns about the quarry's potential impact on cultural sites as well as unspecified rare native species. In her oral statement to the commission, she specifically called out the potential presence of yellow-faced bees, a native insect that obtained federal protection in 2016, a decade after the initial LUC permit was obtained.

Under normal circumstances, the suspected presence of a federally protected endangered species would be of concern to the commission. In the context of a special permit, however, it has been the practice of the commission to limit itself to considering only the record that the county has given it. Orodénker, the LUC's executive officer, explained it this way to *Environment Hawai'i*: “[W]e have the authority to modify an SP [special

permit] but if there is some issue that was not dealt with at the county level, it has to be remanded. The evidence-gathering and the due-process hearing takes place at the county level.” The options available to the LUC, Orodénker said, are: it can amend the county decision, reject it, or remand it to the county for further action. It cannot, however, consider any issue that wasn't included in the county record, he said.

The LUC statute, Chapter 205 of Hawai'i Revised Statutes, does not clearly state this. Rather, according to Orodénker, the basis for this is an attorney general opinion issued some decades ago. The gloss on HRS §205-6, which deals with issuance of special permits, mentions an attorney general opinion issued in 1968, which discusses the “authority of land use commission to modify permit approved by county commission.”

That opinion, No. 68-30, was written in response to a question as to whether the LUC could extend the term of a special permit issued by Kaua'i County for a helicopter operation. The county had set the termination date as June 30, 1969, but that was amended at the LUC level to December 31, 1969, a date that coincided with the helicopter operator's lease of the property on which it operated.

“We think the Land Use Commission does not possess the power to extend a time limitation imposed by a county commission as a condition of its approval of an application for a Special Use Permit,” states the opinion, written by Jack C. Morse, deputy attorney general, and approved by Bert T. Kobayashi, attorney general at the time.

The notes to the statute also reference a Hawai'i Supreme Court opinion, *Perry v. Planning Commission of the County of Hawai'i*. In that case, a quarry operator on the Big Island wanted to include screening and crushing operations, as well as a cement batching plant, in its activities, but the county recommended against this. When the LUC considered the special permit, it included those operations. A resident challenged the LUC action, but the Supreme Court upheld it. Since the operations were included in the original application the quarry operator had filed, the court determined, the LUC could approve them. Again, this case would not appear to tie the hands of the

*Continued on next page*

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LUC in the way that the commissioners seemed to think at the June meeting.

Michael Hopper, the deputy corporation counsel for the county, told the commissioners that any evidence needs to be introduced at the Planning Commission for it to be a matter of record. "I would love to have this clarified," he said. "I don't see restrictions on introducing new evidence at this level, ... but I believe you're in a contested case where essentially the evidentiary period is closed. The parties have to refer to that record."

"My only thing to point out," he added, "check with your AG on whether oral testimony can be accepted at this stage in the proceeding. ... We are repeatedly told at this stage there's no opportunity for new evidence."

Commissioner Dan Giovanni of Kaua'i said he, too, was "very concerned about the protocol we may be establishing when any public testifier can come forward ... to lay a claim at this point ... and throw it into a situation where we are seriously considering remand of the petition back to the beginning. I just have a lot of concerns about what precedent we might be setting. ... I can see in all future LUC petitions, we're opening the door for somebody to intervene, not to intervene, but just to present public testimony, raising concerns from left field, unverified. Throwing everything into turmoil." When DeNaie was questioned by commissioners, she acknowledged that neither she nor anyone else from the Sierra Club had testified when the quarry permit came before the county Planning Commission. "We missed that agenda item," DeNaie said.

Commissioner Arnold Wong then asked her why her testimony was "so last-minute?"

"We have no staff," she replied. "Our actions need to be approved by our board of directors. The directors met on Monday, and we wrote the letter Tuesday." The commission was meeting on Wednesday.

Commissioner Gary Okuda asked if the Sierra Club was opposed to the quarry.

"We did talk about this a little at our meeting," she said. "Our overall feeling was that the quarry operation does provide a service for the community ...

However, it appeared that there had been kind of lax oversight over the years at this location."

Commissioner Lee Ohigashi was first to suggest that DeNaie's testimony could not be considered. "We can only rely on the record that is on file," he said. "I'm concerned whether these issues you brought up had been brought up to the Maui Planning Commission in a previous proceeding that may be included as part of the record."

Again, DeNaie said that her group didn't testify when the Planning Commission considered the quarry permit time extension, given the limitations of its volunteers to monitor all agendas of state and county boards.

Commission chair Jonathan Likeke Scheuer questioned DeNaie about the yellow-faced bees. "You said they were listed ... in 2016," he said. "That's since the last time this permit came before the LUC."

"Do you think that, since it's a renewal of a special permit, are they required to look at those kinds of things?" he asked.

"Under your duty to protect natural and cultural resources [including]... a rare native species found nowhere else," DeNaie replied, "I would think you would have a duty to ask the applicant to conduct a survey and determine if their activities would have any impact on the habitat of the bees."

Scheuer posed the question to Esmeralda: "Was a review for any additional endangered or threatened species that had been listed since the previous permit was issued a part of your firm's preparation of the special use permit time extension application?"

Esmeralda said it was not.

Scheuer: "So you didn't go through and say, are there any changed conditions?"

Again, Esmeralda replied in the negative.

**'Repatriation'**

One of the issues that has bothered commissioners in the issuance of special permits has been their longevity. Permits issued for limited-time uses become effectively open-ended, with the most notorious possibly being the permit for the Waimanalo Gulch landfill on O'ahu.

Scheuer asked Esmeralda about post-

quarry plans for the area.

"I don't believe we specified anything, any specific agricultural use that would occur following quarrying use," he replied.

"So, at the end of operations, what is the ag use going to be?" Scheuer asked.

Karlynn Fukuda of Munekiyo Hiraga jumped in at this point: "Hawaiian Cement leases the property from the landowner, so it's the landowner's decision to determine what, if any, agricultural operation they would like to do with the land. Once the lease ends, Hawaiian Cement doesn't have any jurisdiction."

(Unmentioned at any point in the LUC meeting was the fact that the lease terminates in 2024.)

Scheuer pressed on: "But, Miss Fukuda, is it required under the nature of a special use permit, that the land would then presumably still be suitable for agriculture at the end of the permitting period?"

Fukuda referred to the requirement that the quarry "provide a remediation plan" for county review.

"I don't think you're answering my question," Scheuer said. "Should the land be suitable for agriculture at the end of the special use permit period?"

Fukuda took a moment to answer. "Yes, it's a simple answer, I guess."

Ohigashi, who represents Maui, followed up with still more questioning on this point.

"I'm a little concerned with the response to one of the chair's questions about the responsibility of returning to agriculture.... It appeared that the petitioner seemed to say ... that the type of activity would be up to the landowner because they're the landowner and we're the lessees. Is that what the petitioner is saying?"

Fukuda: "Maybe I didn't understand the question correctly, but I did want to make it clear that Hawaiian Cement, the applicant, has a lease agreement with the landowner. ... So their lease agreement is relative to the quarry they have, and following completion of the quarrying operation, the land, according to the lease agreement, would be returned back to the landowner. ... Agricultural operations following the quarrying operation is not something that Hawaiian Cement may be in the business of."

*Continued on next page*



*LUC from Page 10*

Ohigashi said it concerned him that Fukuda's response, that her client was only leasing the property, didn't address the return to its past use—"repatriation," as he called it.

"We're not talking about the lease. We're talking about the special use permit. If the petitioner can slough it off and say, I'm only interested in the quarry and not the return of the land to an agricultural use ... My question then is, shouldn't we have the owner as a party?"

After much discussion, the commission ultimately decided that since Condition 12 of the existing permit already required Hawaiian Cement and the landowner to prepare a closure plan and present it to the county for approval, the LUC did have authority to tweak that condition. In the end, it voted to require that the condition be changed to not only prepare a plan, but also "timely implement" it.

**The Last Word**

One of the other issues that bothered the LUC was the county's proposed removal of a requirement in the original permit that there be ongoing archaeological monitoring during quarry operations. According to the county, it had obtained a letter from the State Historic Preservation Division relieving it of the need for constant monitoring.

However, the letter was not included in the record forwarded by the county. In the final order approved by the LUC, this issue is addressed. "The commission found during deliberations that ... the required SHPD correspondence" had not been included in record, the conditions would be retained.

And as for the yellow-faced bees?

The commission "found Ms. DeNaie's testimony to be reasonable and compelling such that further review of measures to protect the yellow-faced bees was warranted," according to the decision and order approving the time extension.

With that, it added Condition 24 to the permit: "That the Department of Land and Natural Resources-Division of Forestry and Wildlife and the United States Fish and Wildlife Service be consulted with regard to the issue raised on Hawaiian 'yellow-faced bees' in the Petition Area." — **Patricia Tummons**

## Wespac Endorses Changes in Gear Intended to Protect Sharks, Seabirds

Last month's virtual meeting of the Western Pacific Fishery Management Council brought few surprises, but the council did take two votes that should reduce the impact of longline fisheries on protected species. It:

- Voted to recommend a change in fishing rules for the deep-set (tuna-targeting) longline fishery, requiring the use of monofilament leaders instead of wire leaders. The leader is the short length of line that dangles from the branch line to the hook. The change is expected to reduce the fishery's catch of oceanic whitetip sharks, a species federally listed as threatened; and

- Gave preliminary approval to the use of tori lines to discourage seabirds from interfering with the setting and haul of longlines. A tori line is a rope hung with streamers that is deployed from a fishing vessel as baited lines are set.

**The Monofilament Leaders**

The switch to monofilament line was proposed by the Hawai'i Longline Association (HLA) last year. The organization, which represents most of the 146 or so permitted longline fishing vessels in Hawai'i, announced that by July 1, its members would convert from wire leaders to monofilament to reduce the catch of oceanic whitetip sharks, which

are listed as critically endangered by the International Union for Conservation of Nature. Each year, about 1,700 oceanic whitetip sharks are caught by the longliners; none is retained. The switch should allow the sharks, and perhaps other protected species as well, to bite through the line.

According to HLA and Wespac, the wire leaders had been preferred over monofilament line, since they reduced the chance that the weighted branch lines could fly back and injure crew during hauling operations.

In addition to requiring the use of monofilament leaders in the deep-set longline fishery, the council recommendation to the National Marine Fisheries Service, the agency that has final say over fisheries regulation, that it require clipping the line close to the hooked animal in order to minimize trailing gear, which can impair the released animal's chance of long-term survival. This proposed rule would apply not just to the deep-set longliners, but also to the shallow-set fishery as well, which targets swordfish. That fishery already uses monofilament leaders, so the council opted not to include it in the monofilament requirement.

In addition to developing gear that

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### *Wespac from Page 11*

will facilitate the switch to monofilament line, HLA executive director Eirc Kingma stated in written testimony, the organization is “developing crew training materials and a crew-dedicated web portal. Crew will login to a page on HLA’s website and receive training on oceanic whitetip shark (OCS) handling and safety protocols as well as other information.”

In developing alternatives for council consideration, the staff included the option of removing shallow hooks from each “basket” – the section of longline extending between floats. About 40 percent of the oceanic whitetip sharks are caught on the three shallowest hooks on either end of the “basket” (which consists of about two dozen hooks between floats). But the council rejected this option. In addition to catching sharks, these relatively shallow hooks also catch economically valuable species such as mahimahi, opah, and ono. The HLA has argued that this option would cost the deep-set longline fleet more than \$11 million a year.

Brettny Hardy, an attorney with Earthjustice, testified on behalf of the Conservation Council for Hawai'i and Moana Ohana, an ocean-oriented nonprofit based in Kona. The groups supported the requirement for monofilament leaders and removal of trailing gear, she said, but also strongly favored removal of the shallow hooks on either side of the basket.

In the final vote on the matter, the council approved just the monofilament and gear removal requirements.

In addition to needing to mitigate catches of the oceanic whitetip shark, the council was also required by the Magnuson-Stevens Act, which governs U.S. fisheries, to address catches of the

silky shark, which is subject to overfishing in the western Pacific. The council determined that the same measures that it has recommended to reduce the catch of oceanic whitetip shark would also reduce the catch of silky shark.

### *Tori Lines*

For many years, tori lines have been used by foreign fleets to discourage seabirds from taking bait off the longlines as they are being set. While the council has had discussions over the years about requiring longliners to deploy tori lines, the council never fully embraced the idea.

Recently, though, increases in the bycatch of blackfooted albatrosses by longliners have prompted the HLA, the council, the Pacific Islands Fisheries Science Center, and NMFS to take another look at the technique.

Asuka Ishizaki, the council’s endangered species specialist, outlined a possible regulatory approach to tori lines, requiring the attached streamers to be a minimum of 30 centimeters long and less than 1 meter apart. In addition to what might be required by rule, she proposed non-regulatory measures that would give flexibility to vessel owners as to the exact way in which the streamers are to be set.

The council voted to approve Ishizaki’s approach. Final action to forward a rule to NMFS will likely take place at a future meeting.

### *BiOp Involvement*

A long-standing complaint of council executive director Kitty Simonds has been that the council is not made party to early drafts of biological opinions prepared by NMFS that describe impacts of fishing on endangered species or other animals that enjoy federal protection.

At the May meeting of the Council

Coordination Committee – consisting of directors from all eight fishery management councils plus selected staff and consultants – the group endorsed “strengthened relations between NMFS and councils on ESA [Endangered Species Act] consultations.”

Under current policy, the council is given no special consideration, being allowed to comment on proposed biological opinions at the same time that they are made available for comment from the general public.

Simonds told the council that Sam Rauch, NMFS deputy assistant administrator for regulatory programs, had indicated he was open to this increased collaboration with councils in developing BiOps.

Mike Tosatto, head of NMFS Pacific Islands Regional Office, replied that while Rauch had committed to reviewing the policy, “there are some core tenets” that can’t be changed. “We must have heard some different things out of Sam,” Tosatto added.

Tosatto said he regretted what had been done with the BiOp for the shallow-set longline fishery years ago, when the council was allowed input in advance of the draft becoming public. “What we did with shallow-set was wrong ... I made that error. I won’t make it again,” he said.

In reply, Simonds noted how, in the past, when the council was denied an advance look at a BiOp, it did an end run around NMFS by getting it from HLA, which, thanks to litigation, had been offered an opportunity for input at an early stage of development.

“You know very well, when you offer the applicant – as well as not even applicants – to view a draft before it becomes public, we’ll get it from the applicant,” she said. — *Patricia Tummons*