

Shifting Sands

People who live on or own property threatened by rising seas are increasingly looking for ways to protect their homes and investments. Seawalls and other defenses have fallen into disfavor and, in any case, are now nearly impossible to permit.

In Waikiki, the state's interest in maintaining the beach has caused it to underwrite restoration efforts. But what of the rest of the state?

A group of property owners in West Maui is hoping to develop a third way. The plan they have prepared calls for the beach fronting their properties to be built up with sand from offshore sites and held in place with groins. Making it unique is the absence of public funding for such a large project, which will cost as much as \$40 million.

If it moves forward at all depends on many factors falling into place. Whatever happens, the Kahana beach restoration project has already broken new ground.

Draft EIS Describes Plan to Address Coastal Erosion in Kahana Bay, Maui

Kahana Bay, about seven miles north of Lahaina on Maui's west side, has seen substantial erosion in recent years, exacerbated by a series of shoreline protection structures installed over the last few decades. Now, a group that represents owners of nine condominiums and one lot with a single-family house has come up with a plan to mitigate erosion and protect the existing buildings.

The plan developed by that group, the Kahana Bay Steering Committee, involves construction of seven T-groins extending 215 feet from the shore and rising about six feet above sea level, dredging of three offshore sites for sand, placement of up to 100,000 cubic yards of sand along the eroded beach so that it approximates the beach that existed in 1975, "reinforcement" of a headland at the northern end of the project area, and placement of a three-foot-high vegetated

sand berm between the replenished beach and the condos for most of the 3,700 lineal feet of shoreline fronting the structures. The average beach width will be about 65 feet, with areas near the groins having beaches up to 80 feet wide.

Cost of the project, including maintenance costs over five decades, is estimated to run somewhere between \$26 million and \$40 million.

A draft environmental impact statement (DEIS) published last month provides details. (Last month's DEIS is actually the second one; the first, released last April, did not include agency consultation comments and responses in a separate section.)

The DEIS, which runs to more than 1,000 pages, states that the action is needed if the area is to exist at all under

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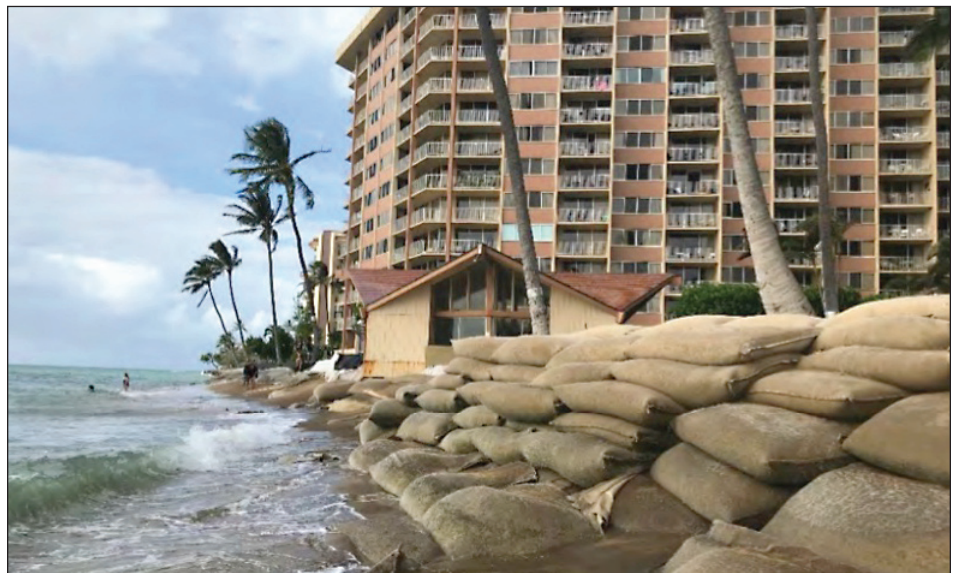
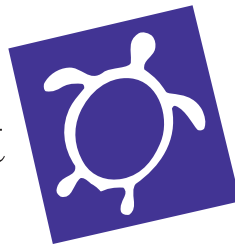


PHOTO: OCEANIT

A sandbag revetment protects one of the properties along Kahana Bay.



NEW AND NOTEWORTHY

NWHI Sanctuary? The National Oceanic and Atmospheric Administration has launched the process of designating the marine portions of the Papahānaumokuākea Marine National Monument as a national marine sanctuary.

NOAA announced on November 19 that it would be taking comments on the proposal during the scoping period ending January 31, 2022. Following that, a draft environmental impact statement is to be prepared and available for review in January 2023, with the final EIS available sometime next fall.

Comments may be made online by going to <https://www.regulations.gov>, entering NOAA-NOS-2021-0114 in the search box and clicking on the “comment” icon. At that point, commenters should fill in the required form and then enter their comments or upload them.

Comments may also be mailed to PMNM-Sanctuary Designation, NOAA/ONMS, 1845 Wasp Blvd., Bldg. 176, Honolulu HI 96818.

Finally, oral comments may be made during virtual scoping meetings to be held December 8 at 6 pm, December 11 at noon, December 14 at 6 pm, and December 16 at 3 pm. For details on how to register, see <https://sanctuaries.noaa.gov/papahānaumokuākea>.

Spinner Dolphin Meeting: In late September, the National Marine Fisheries Service proposed a rule that would protect the daytime resting areas of spinner dolphins at five sites in the Main Hawaiian Islands. The proposed rule would ban “any person or vessel, on or below the surface, to enter, cause to enter, solicit to enter, or remain” within any of the five areas from 6 in the morning to 3 in the afternoon at Kealakekua Bay, Honaunau Bay, Ho’okena, and Makako Bay on the Big Island, and La Perouse Bay on Maui.

NMFS has now announced it will hold a virtual hearing on the proposed rule this month.

On December 9, from 5 to 8 pm, any member of the public can join the hearing. To do so by internet, click on <https://noaanmfs-meets.webex.com/no->



PHOTO: ADAM U

Spinner dolphins.

[aanmfs-meets/j.php?MTID=mce215a9f-fa3f601324ffecaoddbcb8](https://noaanmfs-meets/j.php?MTID=mce215a9f-fa3f601324ffecaoddbcb8) and enter the password “dolphin”. Phone access is at (415) 527-5035.

To review the proposed rule, see <https://www.fisheries.noaa.gov/action/proposed-rule-establish-time-area-closures-hawaiian-spinner-dolphins-essential-habitats-main>.

Seawall Saga: The state and owners of an illegally built seawall on O’ahu’s North Shore failed to reach a settlement last month. A jury-waived trial in the state’s case against James and Denise O’Shea, and the O’Sheas’ case against their former neighbor, Rupert Oberlohr, has been rescheduled to begin on August 22. It had been set to start in January.

In 2017, the O’Sheas built a 13-foot-high seawall to protect their property after the old wall collapsed. The O’Sheas claim that work Oberlohr had done on the old wall caused it to fail. The state has alleged that the new seawall sits on state land.

Correction: Our August 2021 Board Talk item on guidelines for small-scale beach restoration misstated that Category 3 projects were those that used more than 25,000 cubic yards. In fact, Category 3 projects are those where more than 1,000 but less than 25,000 cubic yards of sand are placed on a beach.

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Quote of the Month

“We have modified nature so much, it really is our kuleana to take action where we can.”

— Sam Gon,
Land Board

Wespac Objects to Proposed Changes In Federal Fishery Management Law

Since its passage in 1976, the Magnuson-Stevens Act (MSA) has governed fishing in the federal waters of the United States. This is the law that established the governing framework of eight regional councils that are to recommend to the National Oceanic and Atmospheric Administration rules to manage fishing in their jurisdictions. For the region covering Hawai'i, U.S. territories in the Pacific, and other U.S. possessions, the respective council is the Western Pacific Fishery Management Council, or Wespac.

The MSA has been reauthorized several times over the years. And now Congress is considering yet another round of amendments to the act.

Probably the most far-ranging of these is H.R. 4690, introduced by Reps. Jared Huffman of California and Ed Case of Hawai'i. Among other things, the bill contains several provisions that would rein in some of the council's more controversial practices, require greater transparency, and hinder its ability to underwrite council members' pet projects throughout the region by administering, with little oversight, the so-called Sustainable Fisheries Fund.

Last month, the Water, Oceans, and Wildlife subcommittee of the House Committee on Natural Resources held a hearing on proposed changes to the MSA. While Wespac executive director Kitty Simonds was not invited to testify, she, the council chair, and its four vice-chairs signed a letter to the bill's sponsors, attached to which was a 10-page summary of the council's objections to provisions in the bill.

Transparency

Among the eight councils, Wespac is perhaps the least transparent. Its website rarely links to all the materials given to council members in advance of council meetings. And when such links do exist, they are taken down within days.

Materials relating to council finances are never posted. Members of the public are excluded from discussions of finances during meetings of the council's Executive and Budget Standing Committee.

In the letter to Huffman and Case, the council states that "Transparency

and public involvement are foundational elements of MSA for carrying forward fisheries management decision making." However, in the comments appended to the letter, the council complains of the bill's proposals to mandate transparency and accountability. For example, the proposal to require roll-call votes on non-procedural matters "would result in an additional burden to the councils as many of its actions are non-procedural. ... This provision would significantly increase the time spent on discussions and recommendations during meetings, lengthening meetings, and perhaps delaying the agenda for members and the public," the council argues.

HB 4690 would also require councils to post on their website videos of council meetings "or a searchable audio recording or written transcript of each meeting of the council and of the meetings of committees."

This, too, was criticized by the council. "Including audio/video/transcripts on the council's website would need to consider privacy and consent laws and may also discourage full discussion and participation by both members and the public. While council meetings are public, there are concerns of discussions being taken out of context as well as inadvertent comments being captured on audio or in transcripts," the council states. Also, the council "would require additional resources in order to meet this provision."

Accountability

The federal government writes the checks for council employees, and yet the MSA, as currently written, does not specifically state that the council and staff are federal employees. HB 4690 would change this, by requiring council employees, "including executive directors, ... be deemed federal employees with respect to any requirement that applies to federal employees." It also would make members of the council, council committees, and council advisory panels "subject to all law, rules, and policies regarding ethics and sexual harassment and assault that apply to federal employees."

Wespac objects to this: "Council staff

are not federal employees under the MSA which allows for greater flexibility in council operations and the ability to develop a different relationship with the fishing community. A restriction to council staff by designation as federal employees could reduce its effectiveness in its relationship with the fishing community and the public."

In any event, the council goes on to say, this "may be redundant as council staff, members, and advisors are required to adhere to the Rules of Conduct by the U.S. Department of Commerce."

If council staff, up to and including the executive director, were to become federal employees, it would limit Simonds' ability to hire and fire at will and would curb her ability to give generous bonuses to selected staff.

Membership

Anyone who has followed Wespac for any length of time comes to the realization that the pool of members is extremely limited. Federal law limits members to three consecutive three-year terms, but nothing prohibits them from being appointed again after they have sat out a term or two.

Time and again, the same names appear. When the third term of Manny Duenas of Guam expired, his son Michael kept the seat warm until Manny could occupy it again, which occurred earlier this year. (On the same day the elder Duenas was sworn in as a new council member earlier this year, his son was appointed as an alternate on the Guam Advisory Panel, one of several committees that advise the council.) When McGrew Rice termed out as council member from Hawai'i, he was appointed to hold the at-large seat for the Commonwealth of the Northern Mariana Islands.

When long-time council member Ed Ebisui died in 2018, his seat went to his son.

American Samoa's William Sword is another council frequent flyer.

On those rare occasions when the secretary of Commerce approves gubernatorial nominees for council membership that have not met with Simonds' approval, their tenure is rarely for more than one term.

HB 4690 attempts to broaden council membership by requiring the secretary of

Continued on next page

Commerce to appoint to each council individuals who are knowledgeable in the area of either “conservation and management, or the commercial, recreational, or subsistence harvest, of the fishery resources of the geographic area concerned” or “ecosystem-based fishery management or climate science.” In addition, at least one council member should not have any financial interest in the matters that come before the council.

Wespac objects to this as well. This provision “could lead to fewer fishermen on the council and impact the bottom-up approach to fisheries management instituted by the MSA. ... A dilution of input from council members with direct fisheries expertise to a more general ecosystem, science, and conservation expertise could result in potentially uninformed and ineffective management decisions.”

As to the proposal that at least one council member have no financial interest in the fisheries under the council’s jurisdiction, the council says there is no need for that. “MSA addresses financial interest through disclosure and recusal under limited circumstances. Council members are required to submit a conflict of interest statement that NOAA general counsel reviews before decision making. ... This provision would increase the burden on the council to review all potential interests now and in the future.”

“The subrecipients did not provide adequate documentation to support certain claimed costs and did not spend all federal funds received.”

— Wespac audit

Yet another proposed revision to the MSA, specifically addressing Wespac, would restrict the appointment of at-large members to hold seats outside of their home jurisdiction. “In appointing at-large members to [Wespac], the secretary shall ensure geographic representation across all constituent states of the council.”

Sustainable Fisheries Fund

One full page of Wespac’s comments is given over to objecting to the bill’s proposed changes to the Western Pacific Sustainable Fisheries Fund. Congress established the fund to support fisheries development in the U.S. territories. It

receives fines collected from owners of foreign boats found to have fished illegally in U.S. waters and also, since late 2011, it is the depository for the payments made by Hawai'i-based longliners each year so that they can continue fishing for bigeye tuna against territorial quotas long after they have maxxed out the quota allocated to Hawai'i by the Western and Central Pacific Fisheries Commission.

For many years, decisions as to how the funds should be spent were made by Wespac, with little to no oversight from NOAA and no public input. HB 4690 proposes that those decisions be made now by NOAA following advice from a panel completely independent of the council.

Two years ago, three members of the House — Reps. Huffman and Case, and Raul Grijalva — and the delegate from the Commonwealth of the Northern Mariana Islands, Gregorio K.C. Sablan, asked NOAA’s inspector general to audit expenditures made from the SFF.

That audit was released last month. It found that records of expenditures for several years could not be found. Of the records that were examined for the years 2010 to 2019, the council could not adequately account for \$1,237,671 in awards — or roughly 40 percent of the \$3,038,496 in claimed costs. The council, the audit states, “did not retain adequate

support for claimed costs, obtain required approvals from the awarding agency, or properly allocate costs to the WPSFF awards. The subrecipients did not provide adequate documentation to support certain claimed costs and did not spend all federal funds received.”

Among other things, the council was faulted for making payments from grant awards before the grant was received, paying tens of thousands of dollars for travel expenses for non-employees without receiving approval from NOAA, and using SFF funds to cover council administrative costs. In that latter category, for example, the audit found “improperly allocated claimed costs of \$552,235 for administra-

tive costs ... including a \$115,000 year-end contribution to employee 401k plans, \$108,341 for office rent, and \$271,121 for employee compensation.”

Despite the opacity of the existing procedure for allocating monies from the SFF, Wespac states that the proposal to have decisions made by an advisory group “may reduce transparency and limit input from the fishing community, which is afforded through the current process.”

More than a decade ago, a staffer at NMFS’ Pacific Islands Regional Office informed *Environment Hawai'i* that changes in program expenses of up to 10 percent of the value of a grant could be made without prior approval from NMFS. The audit states that the council, too, “believed that moving funds between awards was allowable if less than 10 percent of the total award.” This claim was unfounded. — *Patricia Tummons*

For Further Reading

Environment Hawai'i has published many reports addressing Wespac expenditures and procedures. For example:

- “Hawai'i Gets Special Treatment in Revised Magnuson-Stevens Act,” April 2007;
- “NMFS Reporting Requirements Give Council Broad Leeway Over Spending,” June 2008;
- “Fishery Council Balks in Complying with Freedom of Information Act,” “Wespac Erects More Hurdles in Path of Public Seeking Council Information,” and “FOIA Responses Shed Light on Council Support of Puwalu,” May 2009;
- “Meeting of Government Fishery Managers at Kohala Resort Costs Public a Quarter Million,” May 2013;
- “Wespac Fails to Account for Food, Drink, at 2012 Reception It Hosted for CCC,” November 2013.

Some Council Members' Disclosures Show No Relation At All to Fishing

In comments on proposed changes to the Magnuson-Stevens Act, the Western Pacific Fishery Management Council has objected to a provision that would have at least one council member be free of any financial ties to fishing interests under the council's jurisdiction.

However, a review of the eight financial disclosure forms submitted by the non-governmental members of Wespac shows that no fewer than four of them profess to have no relationship whatsoever to any fishing activity, be it commercial, recreational, subsistence, or academic.



McGrew Rice: On Wespac's website, Rice, an at-large member for the Commonwealth of the Northern Mariana Islands, is associated with Ihi Nui

Charters. On his own website, again, Rice invites people to book him as a charter-boat captain for sport-fishing off the coast of Kona. Yet on his financial disclosure form, signed and certified as true by Rice on January 12, 2021, Rice indicates he has no ownership interest in any company or business engaged in any activity under the council's jurisdiction, no ownership interest in any fishing vessel, no ownership interest in any business that consults or advocates for fishing interests, no employment whatsoever with anything having anything to do with fishing, and doesn't serve as an officer, director, or trustee of any organization having anything to do with fishing.



Monique Amani: Amani is identified on Wespac's website as owner of Monique's Joint, a restaurant in Hagatna, Guam. Publicity from Wespac describes her as an avid recreational fisher and expert spear-fisher. In a 2020 interview with Pacific News Center of Guam shortly after her appointment as an at-large council member representing Guam, Amani states that she has been a

commercial boat captain "for more than 10 years, taking customers SCUBA diving as well as fishing/trolling and helping with crew transfers for fishing vessels."

In her financial disclosure form, signed and certified as true on January 18, 2021, Amani responds in the negative to every question having to do with involvement with any activity or association related to fishing.



William Sword:

Sword, the obligatory member from American Samoa, is country manager of Pacific Energy Southwest Pacific, which operates the

fuel terminal in Pago Pago and supplies fuel to fishing vessels. Wespac has described him as a recreational fisher and he is listed as a regional representative of the International Game Fish Association on the IGFA website, which states, "As an IGFA representative, Sword is focused on conserving marine resources and promoting the economic value of sustainable fishing practices in the local angling community." On his financial disclosure form, Sword has answered "No" to every question. As an aside, Pacific Energy Southwest Pacific last year arrived at a consent agreement with the EPA over wastewater discharges into Pago Pago Harbor from the American Samoa terminal. According to the EPA, Pacific Energy will pay a \$300,000 penalty and stop unauthorized wastewater discharges from the American Samoa Terminal. Pacific Energy had an NPDES permit from 2010 through 2015 but failed to regularly sample wastewater or meet other permit requirements. After the permit expired, Pacific Energy operated without one—"in violation of the Clean Water Act and of a related 2016 EPA administrative order—until November 1, 2019, when its current NPDES permit became effective," the EPA states, adding that the lack of sampling makes it impossible to know how polluted the wastewater discharged into Pago Pago Harbor was. It states that the company's discharge of oil, grease and other toxic pollutants

into the harbor "may have damaged water quality and harmed the chemical, physical, and biological balance of the harbor. Many Samoans fish and recreate in Pago Pago Harbor, which is home to important cultural and environmental resources, including nearly 200 species of coral."



Matthew Ramsey:

Ramsey is director of Conservation International's Hawai'i program and began a three-year term on the council in August. The financial

disclosure form Ramsey filled out as a council nominee in March is puzzling. He does not check any yes or no circle on any page of the 12-page form. However, in response to question 1.2.3, "Do you have employment with any other entity engaged in the following activities in any fishery under the jurisdiction of the council concerned?" Ramsey does not answer yes or no, but he does check four boxes, indicating he is somehow related to an entity involved in harvesting, processing, marketing, and providing other services essential to harvesting, processing, and marketing. Finally, the form is unsigned.

Mike Tosatto, head of the NMFS Pacific Islands Regional Office, was asked about the incomplete information, specifically in the disclosure forms filled out by Rice and Ramsey. He said he would refer the question to NOAA's general counsel. There was no further response by press time.

The review process for financial disclosures is clearly set out in NMFS publication 01-116-01, "Procedures for Review of Fishery Management Council Financial Disclosures." There's a multi-step process, involving an initial review by NMFS headquarters to see that the forms are complete. Then there's to be a review by NMFS' Office of Law Enforcement. After that, regional administrators, such as Tosatto, are given an opportunity to review and comment on the forms, following which the forms are made public on the council website.

(For more on this, see "Some Council Family Members Omit Financial Interests on Disclosure Form," from our July 2016 issue.) — *P.T.*

Fisheries Fund Awards by Wespac Are Criticized by Commerce Auditor

For years, the Western Pacific Fishery Management Council has doled out millions of dollars to U.S.-flagged island territories from the Western Pacific Sustainable Fisheries Fund. But the way in which the funds have been distributed has always been a black box. Each territory has a Marine Conservation Plan, with lists of priority projects and objectives, that is to be used as a guide for the expenditure of SFF monies. Yet the decisions as to what and who gets the money are never discussed in a public forum or voted on at a public meeting.

It is hardly surprising, then, that when the Department of Commerce's Office of Inspector General finally got around to auditing the council's awards of SFF funds, it found that 40 percent of the more than \$3 million in expenditures reviewed had been spent without supporting documentation, required approvals, or otherwise without compliance with the Department of Commerce's financial guidance.

Altogether, since 2010, the council has received more than \$7.4 million in SFF awards that it has then redistributed to the territories. Because of records-retention limits, the audit period was limited to awards made since the start of federal fiscal year 2015, during which time the council received about \$4.5 million in SFF awards.

Of that \$4.5 million, the audit found expenditures totaling \$1,237,671 were questionable and it asks the director of NOAA's Grants Management Division to determine how much of that should be repaid. Here's how those questioned expenses were broken down in the audit:

Undocumented Costs

Of those questionable expenditures, documentation was not available to the auditors for \$181,023. That includes about \$95,000 in claimed expenses for supplies, \$13,000 for unspecified administrative costs, \$4,000 for the council's much-touted scholarship program, and \$10,000 in sponsorship of a fishing festival. Also, the council directly paid \$20,000 to a contractor on behalf of a grantee, even though the contract "did not include this expenditure" by

the council.

In a footnote providing further information on this last item, the audit notes that "although the council provided an invoice, at that time there was no basis for the invoice. The expenditure was not included in the subsequently signed contract and represents an unsupported overpayment." What's more, the audit says, the expense is unallowable since it occurred before the grant it was charged against had been made available to the council. As intriguing as this is, the audit does not name names or provide other details of the payment.

Unapproved Payments

About \$320,000 in expenditures were identified as unapproved. "Approval is required for certain expenditures to be allowable," the audit states, "such as payment for non-employee travel costs for conferences or training, payments made to another federal agency, pre-award costs, or deviations from the approved scope or objective of the projects."

The non-employee travel expenses came to nearly \$43,000. As for the payment to a federal agency, again, there is no identification provided in the audit, but the amount paid came to \$119,357. More than \$132,000 in payments were made before the start date of the award, and another \$25,055 was spent on costs "outside the scope of the approved award budgets."

Improper Charges

Charges amounting to more than half a million dollars in administrative costs — \$522,235 — were identified as improper. These included \$115,000 in year-end contributions to employee 401k plans, \$108,341 for office rent, and \$271,121 for council salaries.

"To be allowable, costs must be allocated to federal awards in relation to the relative benefits received from the purchased goods and services," the audit states. These expenses "were not in the council's approved WPSFF award budgets, and documentation was not provided establishing the benefit received to the WPSFF awards in relation to the proportion charged."

Recipients' Questioned Costs

When the council receives a grant from the Sustainable Fisheries Fund, it is to carry out a specific purpose, one that is to be in furtherance of the goals set in the Marine Conservation Plan of whichever territory is the ultimate beneficiary of the grant. The council then awards funds to the party — the subrecipient, in NOAA grant terminology — that is to carry out the tasks set forth in the grant.

Those subrecipients are supposed to follow the same practices that allow for accountability and fairness that the council itself is supposed to follow. Yet the audit determined that more than \$181,000 of the expenditures made by just three subrecipients were questionable.

The Commonwealth of the Northern Mariana Islands' Department of Land and Natural Resources claimed \$109,751 in expenditures without documenting them. Other subrecipients received improper advances on their grants without the council having documentation of funds actually spent or reasons why the advance was necessary.

In addition, subrecipients were often slow in spending awarded funds, with one taking more than two years to do so. In the case of five awards to subrecipients, funds amounting to more than \$151,000 were still unspent at the time of the audit. Of that, \$76,379 was returned unspent, leaving \$74,672 outstanding in unspent SFF funds awarded to subrecipients.

Inadequate Documentation

Finally, the audit notes that the council does not maintain required records showing that goods and services paid for by the council were actually received. The council, the audit states, "is required to maintain records identifying the application of federally funded activities and assets... [B]efore payment can be made to a vendor, the council must have written evidence that the purchased items were received."

Yet "of the 31 contracts and expenditures for goods and services tested, we identified totaling \$53,577 where the council was not able to provide documentation or evidence that the goods purchased were received," the audit says, meaning that "federal award funds may have paid for deliverables which were not received or satisfactory."

Continued on next page

*Audit from Page 6***No Competitive Procurement**

In addition to identifying questionable expenses, the audit faults the council for its procurement practices. “NOAA must approve contracts in excess of \$100,000 awarded on a noncompetitive basis,” it states. “However, we found the council and subrecipients did not always establish that the procurement method and costs charged ... were fair and reasonable.” Four contracts totaling more than \$185,000 were awarded non-competitively, the audit found.

Council Response

The OIG audit and appendices runs to 21 pages. The council’s comments on it come to nearly half that – nine pages. (It would be more if the council used a font size equal to that in the OIG report.)

In its defense, the council claims ignorance. The covering letter, signed by Simonds and council chair Archie Soliai, states that the council “recognizes that improvements in its record-keeping systems are appropriate, and the council remains committed to undertaking these improvements.”

The council disputes the audit’s determination that some costs are questionable because they were not approved in advance. Of non-staff travel costs, “it is reasonable to assume had we asked, it would have been approved,” the letter states. Of funds issued to a federal agency, again, the council says, “it is reasonable to assume that had we asked the reprogramming would have been approved.”

In other instances, it claims ignorance of the required record-keeping requirements and says it has requested NOAA’s grants division “to host grants training specifically for council and territorial agency staff.”

NOAA Oversight

Although the audit did not address NOAA oversight in the audit, it did state that this was a matter that the OIG looked into. In addition to conducting the Wespac expenditure of SFF grants, the audit states, “[w]e also determined whether NOAA provided adequate oversight and monitoring of this program, and will issue a separate memorandum to NOAA.”

— P.T.

Kahana from Page 1

projected sea-level (SLR) rise scenarios. “According to the state of Hawai’i SLR Report ..., the Kahana Bay area is projected to be permanently lost if no intervention is taken,” the document states. Sea-level rise exposure areas under four different scenarios show that even a half-foot rise would leave the ocean lapping at the foundations of almost every building in the project area. A rise of 3.2 feet, which could occur as early as 2060, would put the lower levels of the buildings under water, with the ocean extending inland as far as Lower Honoapi’ilani Road.

Shoreline erosion rates for the area range from half a foot per year to almost two feet per year, with an average of about a foot annually. This, the DEIS states, “is caused by a multitude of factors, including tropical storm and hurricane events, land subsidence, changes in sediment supply, prevalent wind and wave patterns, runoff drainage in the area, and rising sea levels. Episodes of rapid erosion caused by severe wave and current conditions have led to the use of a variety of coastal protective structures, including sandbag revetments, seawalls, sand dune restoration, and sheet-pile structures along the entirety of the shoreline.” Only about a third of those defenses fronting 1,200 feet of the 3,700-foot-long project area were installed with permits for what the DEIS describes as “temporary erosion control.”

The built-up beach — rising to an elevation of around 8 feet above sea level — and the additional three-foot-high sand berm are expected to provide a total of 11 vertical feet of protection to the Kahana Bay properties. Still, the DEIS states, the groins and other measures proposed have been designed “taking into account approximately one foot of SLR.”

If the project is to move forward, many issues remain to be addressed. The Board of Land and Natural Resources must first approve the final EIS and grant a Conservation District Use Permit for work to occur on submerged land and will also require easements from the DLNR to occupy state submerged land. Additional permits will be needed from the Army Corps of Engineers, the state Department of Health, and Maui County.

Rejected Alternatives

If nothing is done, then “current forms



Kahana Bay erosion control project area

of shoreline protection will be allowed to continue,” the DEIS says. All 10 properties in the project area have some form of armoring — vegetated sand berm, rock revetment and rock, rock and concrete, sandbag revetments (including one with a seawall backstop), and three seawalls.

Under the “no action” alternative, those “temporary” barriers would remain. But, the DEIS says, so would “threats to public safety and habitable structures,” “continued coastal hazards,” “water quality concern from shoreline erosion,” and “little to no sandy beach habitat.”

Another rejected alternative is described in the DEIS as “accommodation.” That would involve essentially making adjustments to rising sea level by, among other things, vacating parts of buildings that may be inundated or otherwise threatened by encroaching water and relocating utilities and other supporting services. Downsides of this approach include “continued coastal hazards,” “possible compromise of foundations,” water-quality concerns, and no protection of the beach.

Managed retreat — a much-touted but still inchoate approach — was discussed as a possible alternative. “Managed retreat,” the DEIS states, “is essentially shifting development inland from the coast either by the physical movement of structures or changing the restrictions and management of Hawai’i’s coastal areas. ... A variety of managed retreat approaches may be used. The planned obsolescence approach, for example, requires the incremental removal of structures as they reach the end of their useful lifespan. Other approaches include eminent domain,

Continued on next page

voluntary buyouts and relocation, and transfer of development rights.”

The DEIS notes that there are no “formal managed retreat master plans . . . or standardized strategies for conducting managed retreat.” However, the DEIS analyzes this option by assuming the managed retreat strategy would entail “voluntary fair market value buyouts of all private property” that is likely to flood and preventing new construction in this area.

Of the 961 condominium units in the area to be protected, 811, or 84 percent, are described as being threatened by flooding, erosion, and related damages. A table listed the fair-market values of these properties as \$605 million. Nearly all could be subject to a reduction of value, in whole or part, by rising seas, per the DEIS.

A “secondary alternative” is described, should the full groin project be rejected or infeasible. That consists of replenishing the beach with sand dredged from three offshore sites, as in the preferred alternative. In this case, however, there would be no groins but rather a buried toe. This, the DEIS states, “would provide backshore protection should the erosion of the nourished beach continue towards the properties. . . . The toe protection may be a short sloping rubblemound structure installed below the beach elevation.” The toe could rise four feet above the beach, the DEIS says, and extend “several feet below water level.”

The DEIS lists the drawbacks to this approach: “Without offshore beach stabilizing structures, the nourished beach would continue to erode at the current erosion rates and return to a depleted condition of no maintenance and continued nourishments are done. Further, the identified offshore sand sources may not contain sufficient sand volume to replenish the beach again. The secondary alternative would require nourishment events approximately every nine years, which would result in more frequent environmental disturbance. The reduced efficacy of this alternative compared to the longevity of the beach with structures rendered this alternative secondary to the proposed action.”

Also, it is projected to be more costly. Initial construction costs would be less, running from between \$12 million and \$19 million (compared to the construc-

tion costs for the groin system, estimated to run between \$19 million and \$30 million), but long-term maintenance costs would be considerably higher. For the groin system, maintenance over 50 years is estimated to cost between \$7 million and \$10 million, while the beach-nourishment alone approach would have maintenance costs of between \$18 million and \$26 million.

Financing Options

Given the substantial cost of either the preferred or the secondary alternative, the DEIS describes several approaches to financing.

Perhaps the most promising is the establishment of a Community Facilities District (CFD) by the county. Under this option, the County Council would establish a special taxing district and float a bond to cover the costs of the improvements. Repayment of the bond and debt service would be managed by the county and spread out among the owners of the condo units and the single-family home over the life of the bond.

“Although no CFD has yet been formed for Kahana,” the DEIS says, “it could potentially serve as a financing mechanism at some future juncture. . . . However, CFD funds cannot be used for project maintenance.” Also, CFD projects must be public improvements or government-owned, the DEIS says. One option would be to “establish public improvement status of this project and facilitate the use of CFD. Maui County could take over project management, planning and construction.” A second approach would see the Kahana Bay Steering Committee “plan, obtain permits, manage, and implement the project through construction. If the county deems that the completed project meets requirements, and if the county desires to own the project, KBSC can deed improvements to the county. At that point, the county would reimburse KBSC using CFD funds.”

The County Council’s Water Infrastructure Transportation Committee discussed the project last year, but deferred action. “At the time of writing this DEIS, the use of CFD funds for the proposed action remains unresolved,” the DEIS states.

One potential hiccup in the CFD process would be a decision by some of

the owners of units in the project area to oppose the CFD tax. “If there is not a consensus of the CFD between the owners within the proposed CFD, opposed owners would have the right to protest the tax,” according to the DEIS.

Yet another possible hurdle to approval of a CFD might be raised by parties who oppose shoreline protection in general. Lance Collins, an attorney who has represented several individuals and environmental groups on Maui and elsewhere, told *Environment Hawai'i* that some community groups in West Maui “have been suggesting creation of improvement districts to finance managed retreat.” So if the Kahana Bay residents “go in the direction of using an improvement district for beach nourishment, they will likely get a large vocal group advocating for it to be used for building retreat.”

Another option for financing outlined in the DEIS would be to apply for financing through the Federal Emergency Management Agency’s Building Resilient Infrastructure and Communities (BRIC) program. This new program is intended to help states, communities, tribes, and territories reduce the risks from disasters and natural hazards. KBSC applied for funds for scoping activities, and the Hawai'i Emergency Management Agency included an application for the Kahana Bay erosion control program in its own package of projects.

Yet a third financing option would be for the owners of the units that benefit from the project to raise the funds on their own. In this case, “KBSC would need to develop a cost sharing agreement. . . . [F]uture maintenance and public safety liability issues would be the responsibility of KBSC.”

Land Board Issues

In July, the Board of Land and Natural Resources considered a proposal by its Office of Conservation and Coastal Lands (OCCL) to streamline the permitting of smaller-scale beach restoration programs, involving the placement of up to 25,000 cubic yards of sand.

That, of course, is far less than the volume of sand involved in the Kahana Bay project.

Still, the matter of the severe prob-

Continued on next page

Sadang Family Keeps Tradition Alive in Kahana

Just one property along the Kahana Bay beach is occupied by a single-family home. Far from that being a luxury residence, as the context of surrounding properties might suggest, it is a small (680 square feet) dwelling, built in 1949, and valued by the county at \$55,600. Other buildings on the .6-acre parcel are a carport and two sheds.

Cultural Surveys Hawai'i, which prepared the Cultural Impact Statement appended to the draft EIS, interviewed Felimon Sadang as part of the process of taking statements from key informants.

“Upon reaching Mr. Sadang’s family property,” CSH writes, “it became evident that they are truly a family of fishermen. Nets are hung neatly and large fish coolers are scattered about the property.”

On one side of the property is a condominium, which, the report states, built a rock wall to mitigate erosion. “Mr. Sadang pointed out that before the stone wall was built, the beach was as wide as 200 feet.”

The family tradition of fishing continues. On the day of the CSH interview with Sadang, several of his family members were out on the water. “Mr. Sadang spoke proudly of his

great-granddaughter that she learned how to clean fish and right now his daughter and grandson are slowly taking over the reins to continue to perpetuate this way of life for the family,” CSH reports. “Mr. Sadang mentioned that tako (octopus) was and still is prominent in the area, same with the nehu (Hawaiian anchovy) and ogo (a type of seaweed).”

During the interview, the fishers returned. “A boat slowed to the front of the property with eight or so people on board. . . . [A]s the boat came closer to shore a number of people jumped out to start helping with bringing the boat out of the water. Getting the boat out of the water involved two trucks. One truck stayed on higher ground near the house and was used to pull the second truck and attached trailer up from the sand. It was an amazing thing to see.”

“The overall message I received from Mr. Sadang was that man does not come before nature. Effort may be put forth and millions of dollars used to build seawalls but the sea level is continuously rising and as humans, all we can do is adapt to the changing tides. . . . One of Mr. Sadang’s biggest concerns regarding this project is changing the natural flow of the envi-



PHOTO: OCEANIT

The Sadang family towing in their fishing boat.

ronment. He is worried that moving sand from outer regions to replenish the shoreline will be destructive to the in-shore species and may have rippling effects along the coast.”

After CSH wrote up the interview, it was sent to Sadang to review. During that time, the CSH report states, “there was even more coastal erosion at his property.” The cultural impact statement includes before-and-after photos of the coast fronting the Sadang property.

“In recent conversations with Mr. Sadang, he believes that retreating from the shore and working to provide some kind of beach nourishment is necessary at this point.” — **P.T.**

Kahana from Page 8

lems at Kahana cropped up in the Land Board’s discussion. OCCL administrator Sam Lemmo, who for years has dealt with the problems and frustrations of both the public and landowners trying to address coastal erosion, defended the idea of beach restoration in general.

As Teresa Dawson reported in her write-up of the Land Board’s discussion (August 2021), Lemmo told the board that, “Simply playing hardball with people is not going to give us what we want. It’s going to backfire on us, in fact. We need to find a way forward that is manageable and economical and socially reasonable. . . .”

Lemmo then cited as an example of the critical issues involved the case of

the Kahana Sunset. “What the hell’s the county going to do at Kahana Sunset?” he asked rhetorically. “The building’s cracked. You know, are they going to condemn the building? Well, guess what, they gotta pay them \$30 million now? Or is everybody going to step aside and say, let nature take its course, and then we have a big mess?”

Lemmo later backed off his suggestion that taxpayers would be condemning threatened buildings, and Suzanne Case, chair of the BLNR, made it even clearer: “Just for the record, I’m not sure the government would have to condemn [parcels] at full market value for something that’s seriously compromised, but it is a very thorny situation and lots to work through there.” — **Patricia Tummons**

For Further Reading

The issue of Kahana Bay erosion has been addressed several times in *Environment Hawai'i*:

- “‘Unprecedented’ Permit Extension Is Granted for Rock Retention Fronting Maui Condos,” June 2020;
- “Hololani Lawsuit,” Page Two, August 2018;
- “Shoreline Hardening Policies,” Board Talk, September 2017.

BOARD TALK

Land Board Approves Rescue, Transfer Of Kaua'i Birds Threatened by Disease

A couple, its two offspring, and a single male may be the only surviving 'akikiki left in the Halehaha portion of Kaua'i's Alaka'i plateau, and they may all die of avian malaria as early as next spring.

That's according to Lainie Berry, forest bird recovery coordinator for the state Division of Forestry and Wildlife (DOFAW).

Last month, the state Board of Land and Natural Resources approved her request to rescue them as soon as possible and send them to a conservation center on Maui run by the San Diego Zoo Wildlife Alliance.

There, after a month in quarantine, the endangered honeycreepers will join about three dozen captive-hatched-and-raised 'akikiki.

The Kaua'i Forest Bird Working Group concluded earlier this year that given the mosquito and avian malaria trends in the Alaka'i plateau, it would be best to collect those 'akikiki that are most in danger, Berry said.

The Halehaha unit has suffered significant losses over the past several years. In 2015, 35 separate 'akikiki territories, including 70 birds, had been identified.

This year, only three territories remain and the decline in the number of birds is even more severe. In June, surveys located just 11 'akikiki, and by September, surveyors found just the five.

By capturing and banding the birds, managers have been able to track the 'akikiki's annual survival rate. In Halehaha, the average combined survival rate for males and females dropped from about 75 percent in 2015 to less than 50 percent in 2020.

"This is a major concern," Berry said.

The decline coincides with an increase in mosquito numbers. Berry also noted that mosquitoes were caught in Halehaha this past spring, when they had never been caught in the spring before.

She said that increased mosquito numbers have caused an increase in the

prevalence of avian malaria in all birds at Halehaha. In 1994, it was found in 2 percent of the birds. Now, it's in 20 percent of them, she said.

Breeding Boost

In addition to saving the five 'akikiki there from almost certain death, the division hopes their infusion into the

are aging out. We don't think they can currently act as the insurance population against extinction that we had originally planned," she said, adding later, "They are laying eggs, but the eggs are not hatching."

The addition of the wild birds could "contribute to the genetic and behavioral diversity of the extant captive flock, 'jump starting' or reinvigorating the breeding program," states an 'akikiki protection plan prepared in October by the Hawai'i Endangered Bird Conservation Program, San Diego Zoo Wildlife Alliance, Kaua'i Forest Bird Recovery Project, Pacific Bird

Conservation, DOFAW, and the U.S. Fish and Wildlife Service.

To further aid in breeding success, Berry said that managers will try hand-rearing chicks, diversifying the birds' diet, and enhancing the aviaries.

"In the wild, the territories are spaced out. They don't have pairs next to each other," she said, adding that in addition to being bigger and further apart, the aviaries will have "more solid barriers, so they can't see or hear each other," and the humidity

and rainfall will be adjusted "to mimic more closely what's in the wild."

Mosquito Management

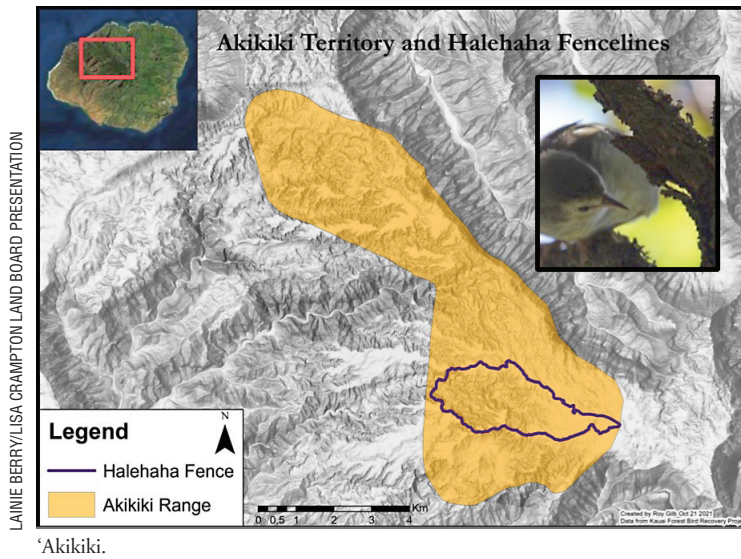
Once the malaria threat is addressed, managers plan to return the captured birds, which are endemic to Kaua'i, to the wild, Berry said.

"Kaua'i, if possible. That would be our priority. We're also looking to establish a population on the Big Island where there is more high-elevation habitat than Kaua'i," she said.

In addition to continuing traditional mosquito-control efforts, such as removing feral ungulates, implementing a landscape-scale mosquito birth-control program is what resource managers hope will alter the survival trajectory of many of Hawai'i's endangered forest birds.

Male *Culex quinquefasciatus* mosquitoes carrying a unique strain of the Wolbachia bacteria are ready to be released in field trials. When they mate with local fe-

Continued on next page



captive population will boost its breeding success.

'Akikiki were listed as endangered in 2010 and in 2018, it was estimated that there could be as few as 120 to as many as 886 of them left in the wild.

Experts now say there may be fewer than 100 left, and Berry said the species could go extinct in the wild in the next three years "or maybe even sooner," as disease-carrying mosquitoes invade more and more of its habitat.

If that happens, the captive population is crucial to the species' survival. But that population needs help, as well.

'Akikiki eggs collected between 2015 and 2018 resulted in a flock of 36 founders, including 15 breeding pairs. Most of the birds are at the Maui facility, but a few are at one on Hawai'i Island in Keauhou.

Berry said that while the birds have laid a considerable number of eggs, they've successfully produced just six offspring.

"They're not breeding as well in captivity as we had hoped. The founders

male mosquitoes, which carry a different strain of the bacteria, the eggs produced should fail to hatch and total mosquito numbers will drop over time.

Berry reported that managers hope to start trials next year and implement landscape-scale mosquito control in high-priority forest bird habitats on Kaua'i and Maui the following year.

Lisa "Cali" Crampton, leader of the Kaua'i Forest Bird Recovery Project, has estimated that it will take a couple of years of regularly releasing the lab-reared male mosquitoes to reduce wild populations to levels safe enough to return the birds back into the wild.

At a recent Hawai'i forest bird conservation crisis summit, experts agreed that the 'akikiki and 'akeke'e on Kaua'i, and Maui's kiwiku and 'akohekohe will go extinct due to avian malaria without some kind of intervention.

Board member Kaiwi Yoon said he hoped the timeline for landscape-scale mosquito control could be expedited. "2024 is probably breakneck speed for us. I think you've said by 2025, if all else fails, this species will be extinct. That's a tight time frame," he said of the 'akikiki.

Berry said that functional extinction, which is when there are too few breeding pairs to sustain a population, could come even sooner than 2025 for 'akikiki. "We are very, very concerned," she said.

"The good news is we do have a captive population. Unfortunately, it's not breeding as well as we had hoped but part of that could be because the birds were collected as eggs. Bringing adult birds into captivity could help with the success of the breeding," she added.

She said that at least a dozen 'akikiki territories in the Alaka'i outside Halehaha are not showing the same kind of decline as inside. "It could be because they are up on the pali and the mosquitoes may not be able to occupy the pali area as well as they occur in the Halehaha area," she suggested.

If the birds in those other territories start to decline, "we may need to act again" she said. "For the moment, we wanted to leave those birds in the wild because they seem relatively stable."

Board member Sam Gon, senior scientist and cultural advisor with The Nature Conservancy of Hawai'i, said as someone who has worked with all four of the birds at risk of extinction, "it really

saddens me to see their decline. It's good to see action is being taken, rather than standing by and watching. ... We have modified nature so much it really is our kuleana to take action where we can."

He seconded Kaua'i board member Tommy Oi's motion to approve DO-FAW's request to move the birds. It was unanimously approved.

(For more on this, see our April 2021 Board Talk item, "Fate of Endangered Forest Birds Hinges On Landscape-Scale Mosquito Control," and our July 2021 New & Noteworthy item. Both are available at www.environment-hawaii.org.)



Board Denies Petition For Rules on Appraisals

On November 12, the Land Board unanimously rejected a petition by the Sierra Club to initiate the Department of Land and Natural Resources' rule-making process to develop guidance for appraisers who may be tapped to determine the fair market value of a water lease to be sold at a public auction.

The organization had submitted its petition in response to guidance prepared by the department's Land Division and presented to the Land Board for approval on October 22.

Because water in Hawai'i is considered a public trust resource and not a commodity, appraisers have expressed

reticence about determining a market value for state water leases.

Several entities across the state have been diverting water under annually renewed revocable permits for years and are eager to secure long-term leases or licenses to continue their diversions. The guidance drafted by the Land Division was intended to help them — and any future water lessees — reach that goal.

The guidance laid out several factors that appraisers should consider and recommended that the starting point for valuation should be the current revocable permit rent. Those factors included the amount of water diverted in proportion to what's available from the diversion source, delivery costs, and the avoided cost of getting the water from practicable alternative sources, among other things.

Before voting to approve an amended version of the guidance, the board denied an oral request for a contested case hearing by Department of Hawaiian Home Lands director William Aila, who believed the guidance failed to ensure that an adequate upset rent would be established. The agency did follow up with a written petition for a contested case hearing, which the board will take up in January.

In the meantime, the Land Board had to deal with the Sierra Club's petition for rulemaking. The group had argued that rulemaking was required by law for the kind of guidance that the board had adopted.

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The group also proffered its own proposed rules. If adopted, they would establish two separate starting points for appraisals of water leases, licenses or permits: one for the use of more than five million gallons a day (mgd), and another for the use of less water.

Dispositions for "Native Hawaiian traditional and customary practices, appurtenant rights, the Department of Hawaiian Home Lands, or for the instream, in watershed cultivation of kalo done in a traditional manner may be appraised at a nominal or gratis value," under the Sierra Club's proposed rules.

Those for the use of less than 5 mgd could be adjusted "based on a demonstrated lack of impacts to public trust purposes of water."

And those for water solely used to produce food for sale solely within the state or "for renewable energy generation may be adjusted based on consistency with state planning act policies, provided that any adjustments shall not affect the amount of revenues to which the Office of Hawaiian Affairs or Department of Hawaiian Home Lands would be entitled based on the initial appraised value, and provided further that such adjustments shall not exceed 10% of the initial appraised value," the proposed rules stated.

Also, adjustments could only follow consultation with OHA, the DHHL, the state Commission on Water Resource Management, the DLNR's Division of Aquatic Resources, and "any other agency with relevant expertise, and only after a public hearing held with 30 days' notice and within the community closest to the affected water source."

The appraiser would also have to address each comment in writing and those responses would be posted on the DLNR's website for a full month before the board would be asked to approve

the lease, license or permit covered by the appraisal.

At the board's October 22 meeting, the Land Division's Ian Hirokawa argued that because the guidance had not yet been tested and was not intended for immediate, broad use, it was too soon to consider turning the guidance into rules.

In the division's November 12 recommendation to the Land Board to deny the Sierra Club's petition, it added, "The guidance is general, non-binding and provides significant discretion for an appraiser to utilize their expertise and professional judgment. ... Furthermore, the board's action should not be considered rulemaking as it does not affect private rights of, or procedures available to the public. While the petition raises important concerns about public trust obligations regarding the use of water, these issues are already directly addressed by the determination of instream flow standards by the Commission on Water Resource Management and the approval of a water lease by the Board, not the process by which water is appraised."

In his testimony opposing the Land Division's recommendation, Sierra Club of Hawai'i executive director Wayne Chung Tanaka countered, "The appraisal guidance specifically concerns the valuation of water leases, which would clearly affect the rights of the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands to a pro rata share of lease revenues. The guidance also specifically impacts the public auction process, which by its very nature is a procedure available to the public."

He cited a number of court cases supporting his argument that rulemaking was required. After meeting in executive session, however, the board chose to approve the Land Division's recommenda-

tion to deny the petition.

Before going into executive session, board member Chris Yuen pointed to what he saw as problems with the Sierra Club's proposed rules. He also noted that should the department take those rules as written out to public hearings, it would likely have to go through the process again after amendments were made to fix those flaws.

"Do you think the board can establish a rule that guided how the lease would be appraised that would incorporate factors not [related to] fair market value? To be specific about this, there are things like whether the food grown is for consumption in Hawai'i versus export for somewhere else," he told Tanaka.

When the Land Board has departed from awarding leases at fair market value, it always points to a specific statutory authorization, Yuen continued. "You're proposing a reduction essentially, potentially in what we would charge a water lease if it was for an agricultural purpose, whether the crop were grown for local consumption. ... Certainly, somewhere, there's state policy of growing food for local consumption. I'm not aware of anything that grants the ability for the board to grant discounts for that," he said.

Tanaka said the board did have constitutional obligations, particularly with respect to water, which is a public trust resource.

To this, Yuen said he questioned whether the board could reduce the rent to an organization that wants to serve a public trust purpose but was not a nonprofit that qualified for discounted rent under current laws.

"You could not really say that ... we have the discretion under our public trust duties, we could discount rent because we like their purposes," he said.

— *Teresa Dawson*