Wespac: Renewed Effort To Delist Threatened Sea Turtles

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Green turtle nests on Tern Island in 2019 season. Pink dots indicate successfully deposited nests. Black dots indicate hatch craters and emergence of at least some hatchlings. Credit: Pacific Islands Fisheries Science Center

The Hawai‘i population of green sea turtles is federally listed as threatened and in 2018, Hurricane Walaka destroyed much of the turtles' preferred nesting habitat in the Northwestern Hawaiian Islands(NWHI). But according to T. Todd Jones of the Pacific Islands Fisheries Science Center, they have since shown how adaptable they can be.

Jones told the council last month that nesting on East Island, one of the main turtle nesting islands at French Frigate Shoals (FFS), is likely no longer viable, because it is now inundated by waves and tides after being decimated by Walaka. However, he said, the turtles have shifted some of their nesting to Tern Island, also at FFS. (See our January 2020 Board Talk item for more on this.)

However, as we reported in January, the habitat at Tern is not great. A map Jones presented of all the nests that were deposited at Tern last year showed that hatchlings emerged from only a fraction of them.

To help determine where else the turtles might be nesting, Jones said his agency is training monk seal researchers how to observe and tag green sea turtles throughout the NWHI.

“What we are most likely seeing in real time is the intrinsic mapping capability of female turtles. In 2019, 2020, 2021, you will have returning females and new females that have no prior knowledge of what happened at East,” he said.

In the past, turtles used to bask on one island and nest on another. “Intrinsically, the animals had a map of French Frigate Shoals,” he said.

He added that most of the turtles used to forage in Main Hawaiian Islands and nest in the NWHI, but more are now staying in the north full time. “We’re seeing their plasticity in their ability to use multiple islands [and] use nesting resources up and down the chain,” he said.

Given the challenges the turtles are facing in the NWHI, council executive director Kitty Simonds — who drove the development of the Association of Hawaiian Civic Clubs’ 2012 petition to delist the turtle — asked NMFS’s Mike Tosatto what his agency was doing to improve the turtles’ population so that it can be delisted.

“Obviously, I’m interested in the green sea turtles. … In terms of the recovery, any different kinds of things going on in terms of being able to take it off the threatened list?” she asked.

In 2015, NMFS broke up the then-threatened green sea turtle population into 11 distinct population segments, or DPSs. The Hawai‘i DPS remained threatened, while those for American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands were uplisted to endangered. Tosatto informed Simonds that NMFS has not written a new recovery plan for the DPSs.

“Recovery criteria might not necessarily be broken up into 11 pieces yet. No, we don’t have criteria for delisting yet,” he replied.

“So you’re going to be working toward criteria for delisting threatened species?” she pressed. “It’s my understanding that our Hawaiian green sea turtle was not removed because of climate change and turtles drowning in the Northwestern Hawaiian Islands. … Interested parties will be investigating how to go about removing it from the threatened list, and we’re interested in cultural takes, as well,” she said.

(In 2014, the National Oceanic and Atmospheric Administration directed the council to investigate the extent to which federal grant funds were misused by council staff involved in preparing the 2012 delisting petition.)

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Batting Down The Bat Takes

When Hawai'i's only land mammal, the hoary bat, collides with the whirring blades of a wind turbine, the outcome is not in doubt. It dies.

And with so little known about this cryptic animal, no one can be sure what damage such interactions inflict on the bat populations on the islands where wind farms have sprung up in recent years.

The state's Endangered Species Recovery Committee met over two days last month to discuss new research aimed at resolving uncertainties surrounding the interactions of bats and blades. A new draft guidance document doesn't begin to answer all the questions but it's a good start.

Draft Guidance Would Further Curb Number of Bats Wind Farms Can Kill

Several million dollars have been spent over the past few years on research, habitat restoration, and land acquisition to mitigate the unexpectedly high number of endangered Hawaiian hoary bats being killed by wind farms across the state.

Last month at the University of Hawai'i, results from that research were presented in a two-day workshop hosted by the state Endangered Species Recovery Committee (ESRC), which advises the Board of Land and Natural Resources on proposed Habitat Conservation Plans (HCPs) and Incidental Take Licenses required for projects that threaten protected native species.

The results of the various research projects, funded by the wind farms as part of their mitigation efforts, helped fill some of the knowledge gaps surrounding the tiny, solitary creatures, and provided the kind of information that will be helpful in shaping future mitigation and take minimization efforts. Much more is now known about what the bats like to eat, where they like to roost, what island areas see the most activity and when, among other things.

Even so, the studies fell short of providing the data necessary for anyone to definitively say how many bats there are, whether their numbers are declining, and, if so, whether it's due to a lack of habitat. Perhaps most importantly, it's still unclear what it will take to offset the losses caused by the wind farms, which is what's required under the state's endangered species law.

"Today was supposed to tell me how to grow bats. I haven't heard anything today," said ESRC member Melissa Price after the first day of presentations. At the end of the second day, she was still unsatisfied. While she said that huge progress had been made over the past

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PHOTO: TETRA TECH, INC.

Kawailoa wind farm in North Oahu.

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NEW AND NOTEWORTHY

'Pretty Stable': Where on O'ahu are endangered Hawaiian hoary bats most active? According to an acoustic monitoring study launched in 2017, "by far and way, the bulk of activity is on northern part of the island," said Joel Thompson of the Oregon-based environmental and statistical consulting firm WEST, Inc..

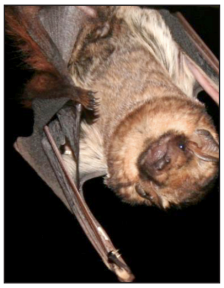

PHOTO: CORINNA PINZARI

Hawaiian hoary bat

Thompson presented his results last month at a workshop at the University of Hawai'i. His work was one of a number of projects funded by wind farms as mitigation for killing the bats.

His study involved the installation of monitors randomly placed inside 2.3-kilometer square grid cells across the entire island. In the course of field surveys over the past two and a half years, monitors picked up an average of zero to four or five calls a night, with the highest detection rates being in the Wai'anae and northern Ko'olau mountains. Detections at Pupukea were particularly high, he said. There and in other primary use areas, as many as 20 calls a night were detected.

The frequency of bat calls varied seasonally, with fewer calls occurring during times when the bats are pregnant or about to be, and more calls after the bats are believed to stop lactating, he said. "Data suggest things are pretty stable," he said.

"This is really exciting to get this information," said Jim Jacobi, a member of the state Endangered Species Recovery Committee, which supported Thompson's research. "We know there are limitations of audio. Do you feel this is an adequate index? Do you think this is representative of activity across the island?" Jacobi asked.

"I feel like it's doing a pretty good job of showing seasonal patterns." Thompson replied.

Jacobi asked Thompson whether he had any idea what was driving the consistent bat activity on the north and northwest sides of the island.

Thompson said he didn't have any good hunches, since some of the high-activity sites were so different from each other.

Committee member Melissa Price cautioned against using Thompson's data as evidence of bat distribution. Rather, she said, it only showed a distribution of bat calls.

Thompson did concede that a lot of bat activity is not picked up by acoustic monitoring. He cited a study that compared acoustic detections with video recordings. It showed that less than 10 percent of the bats that were there were picked up in acoustic monitoring, he said. He pointed out that microphones only have a range of 20-30 meters and bats can zip through an area pretty quickly. (A later presentation by Ted Weller of the USDA Forest Service showed that the bats sometimes also emitted high-frequency micro-calls that would be nearly undetectable to other animals and some microphones. Or they might fly in complete silence. "There is some evidence they are flying without echolocating," he said.)

Bat researcher Dave Johnston questioned Thompson's assumptions about the bats' reproductive conditions. He argued that individual bats have their own timing. "One will finish before another starts. There is a huge overlap," Johnston said.

He suggested that Thompson refine his results to describe what percentage of the bats are in a particular reproductive stage at a given time. "Otherwise, I think you're making a huge assumption." Johnston said. He also asked Thompson if he evaluated how many calls were made per minute. "It could be one bat circling around an area," Johnston said.

Thompson said he had not. He added that his firm would be collecting field data for one more year, then move onto more analysis and data mining.

The results are expected to provide a baseline data set to support future research on long-term occupancy trends.

Quote of the Month

"I don't like to assume, because you know what that makes me."

— Mike Tosatto, National Marine Fisheries Service's Pacific Islands Regional Office administrator

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190 Keawe Street, Suite 29
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Patricia Tummons, Editor
Teresa Dawson, Managing Editor

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Telephone: 808 934-0115.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
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With New False Killer Whale Estimates, Council Pushes to Reopen Closed Area

Recent reports by the Pacific Islands Fisheries Science Center (PIFSC) suggest that the pelagic population of false killer whales within the U.S. Exclusive Economic Zone (EEZ) around Hawai'i may be larger than was previously thought.

Or it may be about the same.

It just depends on the analysis method being used.

Using the old "design-based" method, and data collected from ship surveys in 2017, PIFSC estimates there are 5,106 false killer whales in the EEZ around Hawai'i.

That method is "unbiased, but limiting," Amanda Bradford, a researcher with the center, told the Western Pacific Fishery Management Council at its meeting last month.

Results from a model-based method, which Bradford called "state of the art," indicate that the population within the EEZ is almost the same size — between 2,100 and 2,200 whales — as was estimated in 2002 and 2010.

In the Central Pacific in general, however, the model-based method does indicate that the population in 2017 was larger than it was in 2012 and 2002. PIFSC estimated there were about 32,317 false killer whales in the region in 2017, compared to 24,000-25,000 in the earlier estimates.

Based on this new information, the council voted to ask the National Marine Fisheries Service to explore options for reopening waters south of the Main Hawaiian Islands that have been closed to longline fishing to protect the animals. The closed area, known as the Southern Exclusion Zone (SEZ), makes up a significant portion of the federal waters around the state.

The council recommended that "a simulation-based evaluation of the two estimators be undertaken to better determine the relative value of each approach for management decision making." Even without the results of that evaluation, the council also recommended that NMFS use both the design- and model-based results to develop abundance estimates in the next stock assessment report for the whales.

Under NMFS's take reduction plan for the whales, a closure of the SEZ is triggered when the deep-set longline fishery kills or seriously injures two pelagic false killer whales within the EEZ in a given year. Because the fishery has observers on just 20 percent of its vessels, NMFS interprets an observed death or serious injury of two whales to equal a take of 10 fleetwide.

"When the SEZ was implemented, the estimated population size of pelagic false killer whales allowed a maximum of nine individuals from the stock to be removed by means other than natural mortalities. Above that number could impair the stock's ability to reach or maintain its optimum sustainable population, it was determined. The new estimates may indicate a need to modify that number," a council press release issued last month states.

The SEZ closed last year for the second year in a row. NMFS is still reviewing all of the interactions in 2019 to determine whether or not to reopen the SEZ. Last year, there were 14 observed false killer whale interactions and one interaction with a whale that was not identified as a false killer whale, but was definitely one of the four species of black whales (also called blackfish) that live around Hawai'i. The SEZ was closed in February after two takes in the EEZ. Four more were caught in the EEZ afterward, but only three were determined to have caused a death or serious injury. An additional eight whale interactions and one blackfish interaction occurred outside the EEZ. There were no interactions this year, as of press time.

PHOTO: PACIFIC ISLANDS FISHERIES SCIENCE CENTER

False killer whale

Council member Mike Goto, who also runs the fish auction in Honolulu, seized on the estimates indicating a larger population.

"Obviously, we're seeing abundance estimates going up. You know what our issue is with the SEZ. … How can we get this applied to our current situation?" He asked NMFS Pacific Islands Regional Office administrator Mike Tosatto.

Tosatto explained that the new information will get incorporated into the next stock assessment report, which will include a new estimate of how many whales the fishery can sustainably remove from the population, also known as the potential biological removal (PBR) level.

If, as a result of the new abundance estimates, the PBR grows so much that the population within the EEZ is no longer considered in need of special protection, Tosatto said that NMFS might "sort of walk away from a TRT [false killer whale take reduction team] wholly." Short of that, things would remain much the same, but with a new PBR level and possibly new trigger for the SEZ closure, he said.

It's unclear when that new stock assessment will be completed. Tosatto indicated that the new PIFSC estimates were still being reviewed, and the council's own Scientific and Statistical Committee also needs to complete its review, as well.

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Renewed Effort To Delist Threatened Sea Turtles

The Hawai'i population of green sea turtles is federally listed as threatened, and in 2018, Hurricane Walaka destroyed much of the turtles' preferred nesting habitat in the Northwestern Hawaiian Islands (NWHI). But according to T. Todd Jones of the Pacific Islands Fisheries Science Center, they have since shown how adaptable they can be.

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He added that most of the turtles used to forage in Main Hawaiian Islands and nest in the NWHI, but more are now staying in the north full time. "We're seeing their plasticity in their ability to use multiple islands [and] use nesting resources up and down the chain," he said.

Given the challenges the turtles are facing in the NWHI, council executive director Kitty Simonds — who drove the development of the Association of Hawaiian Civic Clubs' 2012 petition to delist the turtle — asked NMFS's Mike Tosatto what his agency was doing to improve the turtles' population so that it can be delisted.

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In 2015, NMFS broke up the then-threatened green sea turtle population into 11 distinct population segments, or DPSs. The Hawai'i DPS remained threatened, while those for American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands were uplisted to endangered. Tosatto informed Simonds that NMFS has not written a new recovery plan for the DPSs.

"Recovery criteria might not necessarily be broken up into 11 pieces yet. No, we don't have criteria for delisting yet," he replied.

"So you're going to be working toward criteria for delisting threatened species?" she pressed. "It's my understanding that our Hawaiian green sea turtle was not removed because of climate change and turtles drowning in the Northwestern Hawaiian Islands. … Interested parties will be investigating how to go about removing it from the threatened list, and we're interested in cultural takes, as well," she said.

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Shallow-Set Fishery Shrinks

Last year, the number of longline sets targeting swordfish hit a record low of 300, according to Russell Ito of the Pacific Islands Fisheries Science Center. Only 14 of the 150 longline vessels fishing around Hawai'i last year were shallow-set vessels, he said, and even those later switched their gear to target bigeye tuna, which is what the rest of the fleet does.

One of the main reasons for such little interest in the swordfish fishery is the threat of closure due to interactions with endangered leatherback or loggerhead sea turtles. The fishery is currently limited by a court order to catch no more than 17 loggerheads or 26 leatherbacks in a given year. Within the first month of fishing this year, the shallow-set fleet hooked 12 loggerheads.

"Sea turtle interactions this year ramped up really quickly. I thought it was going to close early, but they're still under the limit," Ito said at the council's March meeting. Even so, he added that there isn't much interest in catching swordfish under the threat of a fishery closure. "No one wants to gear up and incur those expenses," he said.

Instead, those former swordfish vessels have contributed to the increase in bigeye tuna fishing effort, which sets far more hooks in the water per set.

Eric Kingma of the Hawai'i Longline Association said it costs between $10,000 and $15,000 to switch from shallow-set to deep-set gear and takes seven to ten days at the harbor to accomplish. "It is a substantial cost to go back and forth," he said.

A new biological opinion and incidental take statement on the shallow-set fishery's impacts on the turtles, issued by the National Marine Fisheries Service last year, proposes relaxing the fishery-wide cap on loggerheads, while restricting even further the allowable takes of leatherbacks. The agency also proposes new trip and vessel limits to restrict the activities of problematic vessels, rather than the entire fishery.

The council and fishery representatives have chafed at the proposed new measures, pointing to the service's own scientists, who have determined that the fishery has a negligible impact on the survival of either species.

However, those same scientists have pointed out that the turtles face a gantlet of gill-net and foreign fisheries, threats to nesting beaches, and feminization due to rising temperatures, which could ultimately lead turtle populations to crash.

"There are many things we have to consider," NMFS Pacific Islands Regional Office administrator Mike Tosatto told the council. He did, however, assure the council that his agency would consider the modeling results on the impact Hawai'i longline fisheries have on the turtles in its upcoming biological opinion for the deep-set longline fishery.

The council voted later to direct its staff to work with NMFS on obtaining publicly available data on sea turtle interaction rates in foreign fisheries operating in areas overlapping loggerhead and leatherback distributions, and to provide the Scientific and Statistical Committee (SSC) with a presentation on that work at the next council meeting in June.

It also recommended that NMFS include a social scientist and an industry representative on its working group regarding turtle protection measures (known as reasonable and prudent measures) for the shallow-set fishery. The council's SSC determined last month that the measures NMFS has proposed are not reasonable.

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Electronic Monitoring

Whether Hawai'i longliners are fishing for bigeye tuna or swordfish, they must limit their interactions with federally protected species or face a partial or complete closure. False killer whales and loggerhead and leatherback sea turtles have been the main species of concern over the past several years, but the relatively recent listing of oceanic whitetip sharks as threatened could also lead to fishery closures, depending on what kinds of regulations the National Marine Fisheries Services adopts to protect the animals.

Federal observers are required on all Hawai'i longline vessels targeting swordfish, and on 20 percent of vessels targeting tuna. Cetacean expert Robin Baird and others have called for electronic monitoring on all vessels to ensure that crews actually handling false killer whale interactions do so in ways that reduce or eliminate mortalities or

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PHOTO: PACIFIC ISLANDS FISHERIES SCIENCE CENTER

Green turtle nests on Tern Island in 2019 season. Pink dots indicate successfully deposited nests. Black dots indicate hatch craters and emergence of at least some hatchlings.

serious injuries. Observers have witnessed captains and crews often cutting hooked whales free with trailing gear streaming from their mouths. Baird suggests the same may be happening regularly on vessels that don't have observers on them.

Electronic monitoring is being tested and implemented in several fisheries in Alaska and along the east and west coasts.

At the council's March meeting, Keith Bigelow of the Pacific Islands Fisheries Science Center presented results from electronic monitoring trials on 18 vessels in the Hawai'i longline fleet that began in 2017.

Video from two cameras on each vessel was only taken when lines were being hauled.

While the reviewers of the camera footage were able to identify targeted catch, sea turtles, marine mammals, and seabirds with about the same accuracy as on-board observers, the cameras and/or reviewers missed about half the sharks that observers saw, as well as a significant portion of discarded bycatch species, such as lancetfish.

Bigelow explained that the reason cameras weren't picking up the sharks are because crews were not always bringing the animals into view. He added that this year they plan to conduct a catch handling study in which sharks are brought closer to the camera's field of view.

While the data are promising, NMFS Pacific Islands Regional Administrator Mike Tosatto had a number of concerns about electronic monitoring. First, NMFS can't require it if associated expenses are unfunded or unsustainable.

With onboard observers, "we have zero data transmission cost now," he said.

He added that the council needs to know whether electronic monitoring is funded and sustainable before it makes recommendations to NMFS on whether or not to require this.

Bigelow argued that the recent study suggests that electronic monitoring would cost $50,000 less than onboard observers.

Even so, Tosatto was not sold. He expressed his concern about the sharks being kept out of the cameras' field of view and the inability to identify lancetfish, which he pointed out don't look anything like tuna.

If certain species aren't being brought into the field of view, Tosatto said, "I would have to assume —and I don't like to assume, because you know what that makes me — it was something not wanted to bring into the field of view. It's a shark or a turtle. That's less beneficial than having a human identify it. I have to rely on the actor acting well. … I need to see the identity of those sharks."

Bigelow countered that the protected species were pretty well documented by the cameras. "We missed one marine mammal. We missed one turtle," he said.

The council's Scientific and Statistical Committee chair Jim Lynch pointed out that the fishery was willing to bear some of the cost. While there is a concern about the potential for having too much electronic equipment on deck, he said the committee thought electronic monitoring should be made mandatory.

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Deep-Sea Mining

At the council's March meeting, University of California at Santa Barbara professor Douglas McCauley briefed members on the potential threat deep sea mining poses to Hawai'i's pelagic fisheries.

McCauley, who runs a website called Deep Sea Mining Watch, said mining could start occurring in a year or two in areas that make up about ten percent of the fishing grounds under the jurisdiction of the Inter-American Tropical Tuna Commission (IATTC).

The Hawai'i longline fleet fishies mainly in the Western and Central Pacific, but does catch a significant amount of tuna in the Eastern Pacific region governed by the IATTC.

Deep Sea Mining Watch maps all of the tracks made by vessels exploring mining grounds around the world. Many of those tracks have occurred across a region southeast of Hawai'i, known as the Clarion-Clipperton zone. The area is known to be rich in polymetallic nodules that contain elements commonly used in electronics, among other things.

McCauley, a marine biologist and former fisherman, explained how large mining machines will excavate the sea floor, causing huge sediment plumes. The dredged material will then be sucked up to the surface through a tube, the valuable minerals will be extracted on a ship, which will then send effluent back down another tube that empties somewhere between the surface and the bottom.

These plumes have the potential to change the acidity and toxicity of the surrounding water and affect the chemistry of food webs, he said. Noise from the operation could also disrupt fish behavior, he added.

The waste plumes, which will create underwater dust storms, will likely include copper, cadmium, cobalt, chromium, nickel, iron, and/or zinc, he said.

"Researchers are looking at how they could come back into food webs and fish," he said, adding that there is a potential for biomagnification of the toxins in species of interest to the council.

In addition, he said the plumes may smother the bottom-dwelling flora and fauna, and the mining vessels operating in the fishing area could pose a safety risk.

The council directed its staff to ask the U.S. State Department for formal, annual updates on international mining activity in the Clarion-Clipperton Zone or near the U.S. Pacific Island territories.

PHOTO: DOUG MCCAULEY

Deep-sea mining vessel

Council executive director Kitty Simonds also expressed concern over the possibilities. "Do we want this to happen 500 miles from us? Maybe not," she said.

Attorney Jim Lynch, who chairs the council's Scientific and Statistical Committee added, "These mining issues are at a juncture where they could benefit from input from the council and NOAA." He suggested that the council should not get bogged down in trying to understand the risks, which, he added, were in his opinion either unknowable or would take too much time and money to determine. Instead, he said the council should focus on quickly recommending measures to minimize impacts on fisheries.

Last summer, the Long Distance Fleet Advisory Council (LDAC) of the European Union called for a moratorium on deep-sea mining in international waters.

According to the website of the Deep Sea Conservation Coalition (DSCC), which supported the order, "the LDAC highlighted concerns by scientists, the fishing industry and environmental organizations over the potentially severe impacts on fisheries, fish and other species in the oceans and inevitable loss of marine biodiversity from deep-sea mining."

The United Nations-established International Seabed Authority is currently developing permit regulations to allow deep-sea mining. The LDAC, however, recommended that none be approved until risks to the environment are fully assessed, a clear case of necessity — not just profitability — is made, and "international commitments to conserve and sustainably use the oceans, strengthen the resilience of marine ecosystems, and initiatives to transition to circular economies, sustainable methods of consumption and production and related efforts as called for in the UN's Sustainable Development Goals 2030 Agenda are recognized," the DSCC states.

(For more background, see, "Treasures of Pristine Ocean Ecosystems Could Be Lost to Mining for Metal Nodules," from our January 2019 issue.) ***— T.D.***

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four years of research, "I don't know how that information plugs into our decisions for habitat conservation plans. How do we get this information to make sure our only terrestrial mammal is still around?" she asked.

Committee members Jim Jacobi and Michelle Bogardus, who helped craft the initial research agenda, admitted that they were perhaps too optimistic that the key questions about the bats would be answered in such a short time.

"The very hard ones were not addressed," Jacobi said.

Bogardus added that they also underestimated the cost. "We knew a lot less than we do now," she said. Even so, she added, "Where we had gaps five years ago, we still have gaps."

To better account for those gaps and help ensure that whatever new or amended HCPs come before it for approval actually comply with state laws that require them to provide a net benefit to native species and the environment, the committee and the state Division of Forestry and Wildlife have drafted a new guidance document.

At the workshop, it was clear that some industry representatives and consultants were concerned about some of the document's provisions, which departed in significant ways from the current guidance, which was developed in 2015.

When or how the committee decides to revise the document, and what weight it will carry in future decisions, is unclear.

"There is no defined process. We don't have a timeline. I want to make sure there's plenty of input. I just want to make sure it's good," said David Smith, ESRC chair and administrator for the state Division of Forestry and Wildlife.

Guidance

The committee has some time to fine tune the guidance document, since it's already dealt with what were likely some of the hardest decisions it's had to make. Last year, the committee was asked by multiple wind farms to greatly increase the number of bats they would be allowed to kill over the course of operations. The request by the Kawailoa wind farm on O'ahu for an additional 160 bats barely won the committee's approval, largely because of the uncertainty surrounding whether or not the island's bat population could handle such an increase, especially without any proven mitigation methods.

Committee members were skeptical of Kawailoa's estimate that there were 2,000 bats on the island. Others complained that, if approved, the facility's plan would allow mitigation to occur on as little as 20 acres per additional bat to be killed, rather than the minimum 40 acres per bat recommended in the 2015 guidance document.

The new draft document, if closely adhered to by the agencies involved in approving HCPs, might drastically limit the number of bats that can be killed by existing and future wind farms. It would also require facilities to pay more in research funding for additional bat takes, to adopt much stricter minimization measures, and to be able to prove that their mitigation efforts actually work.

"[A]pplicants and agencies should assume, until such time as the best available science informs otherwise, that the Hawaiian hoary bat populations on O'ahu, Maui, and Hawai'i are not more than 1,000, 1,500, and 5,000 bats, respectively," the document states. It also recommends that agencies not approve any cumulative levels of take that exceed the populations' annual growth rates, unless the expected net benefits to the bats outweigh the potential losses.

While the actual growth rates for these populations is unknown, a 2013 study of bats on Hawai'i island suggested that in the absence of wind farms, the population there was stable or slightly increasing.

Going on the assumption that the bat populations were stable or slightly increasing, preliminary modeling by the state's bat task force suggests that wind farms on O'ahu may be maxed out. With an assumed population of 1,000 bats, the task force's "best guess" model found that wind facilities on the island could kill no more than 10 bats a year without causing the population to decline. The Kawailoa wind farm alone, before installing acoustic deterrents on all of its turbines last year, had killed an estimated average of 11 a year since 2013. The Kahuku wind farm is estimated to have killed fewer than one bat a year on average since 2010, and the Na Pua Makani wind farm that is not yet operational is expected to kill another 1.7 to 2.5 bats a year.

The guidance document notes that the modeling efforts did not definitively determine how much take should be allowed for wind projects. "They do, however, provide information useful to conservation decisions and assessments on an island-wide basis. … These models indicate that projected levels of take may pose a relatively low risk to large Hawaiian hoary bat populations. For example, if the proposed annual take of bats for the island of Hawai'i was 10 bats/year and the bat population is expected to be over 5,000, there may be low risk to the population. Conversely, an island with under 1,000 bats may not be able to sustain the loss of 10 bats/year," it states.

In many of the facilities' HCPs, funding bat research was a common initial mitigation measure. Under the 2015 bat guidance document, mitigation expenditures were recommended to equal $50,000 per bat taken. That's roughly how much it costs to improve 40 acres of forest habitat, the minimum area thought to be required to produce a single bat. This $50,000 per bat formula is what generated the millions of dollars in research funding in 2016.

Studies completed since then on bat core ranges on Maui suggest that they may forage in relatively small areas or exponentially larger areas, depending on the resources available. But until those studies are better understood, the task force chose to rely on a 2015 study that suggested bats spend half of their time in areas that average 48.5 acres. "Doubling the acreage could provide the other half of a bat's habitat need, if it was of high quality," the document states. It then suggests that mitigation in the form of restoration or enhancement for a single bat loss should now encompass 97 acres of high quality native habitat.

Continued on next page

If facilities want to mitigate their take by funding research instead of habitat restoration, it's recommended they pay the equivalent of restoration costs: $125,000 per bat. While the document recommends 97 acres/bat for habitat restoration, it concedes that using core use areas to determine the size of habitat mitigation areas has some shortcomings. "The most significant issue is that … it is not known if habitat is a limiting factor. If habitat is not a key limiting factor, then habitat restoration as an offset to take is not only a waste of resources, but it also generates a false assumption, or sense of security, that bat populations are benefitting from the mitigation," it states.

With regard to efforts to reduce bat kills, the document recommends, among other things, curtailing operations in low wind (at least 5 meters per second and up to or exceeding 6.5 m/s, "when the cumulative take of Hawaiian hoary bats poses a risk to island populations") and at night.

"Since bats are nearly exclusively nocturnal, HCPs should consider trigger scenarios for which the response [to increased bat take] is to curtail during all night time hours. Adaptive management should include the provision that if authorized take is exceeded, turbines will not operate during times when bat take is possible," it states.

Discussion

At the March bat workshop, the ESRC fielded a number of questions from participants about the direction being taken in the new guidance document.

One wind farm consultant asked about where research funding would come from given the stricter mitigation standards being recommended. In addition to the increased costs, the document recommends that for research to be credited as mitigation, projects be designed to "provide information applicable to improving mitigation and planning during the period of the HCP or should provide information on better management actions for Hawaiian hoary bats that will lead to promoting the recovery of the species."

Bogardus, who represents the U.S. Fish and Wildlife Service on the committee, spoke for her agency, which also approves HCPs and incidental take statements. She said that while there was no question there are extensive research needs for bats and her agency needs that information to make better decisions, for research to now be used as mitigation, it must have on-the-ground benefit for bats.

"It's a hard bar to reach. … We barely made it happen [last time]. I don't think we could make it work for those same research projects today. In order to make it happen, it has to be very tailored," she said, adding that facilities should work closely with the service to ensure the research informs actual bat management efforts.

"We obviously need other funding streams for bat research [but] research is unlikely to be used for mitigation credit," she said. She added that even if it's not given any mitigation credit for research, the industry would benefit from funding research on its own, particularly on deterrents.

Committee member Price reminded everyone that Hawai'i's endangered species law requires that mitigation efforts provide a net benefit to the species being harmed. "If you can't show that, we can't vote yes. That's our job on this committee. The problem is we don't know those answers … so you're stuck stabbing in the dark if you don't have answers. You gotta prove you can grow bats," she said.

"It's net environmental benefits. The law says net environmental benefits," committee chair Smith countered, suggesting that those benefits need not apply strictly to the bats.

"So can we cause a species extinction?" Price then asked.

"It's not that clear," Smith replied, adding that he has been talking with state deputy attorney general Linda Chow, "trying to figure it out."

Committee member Loyal Mehrhoff pointed out that the draft guidance document includes a checklist for HCPs that is supposed to help applicants ensure that they meet legal requirements.

Marie VanZandt, who works for the company that runs Maui's Auwahi wind farm, expressed concern about some of the proposed minimization recommendations. She noted that Auwahi has already adopted a high minimum wind speed for operations, 6.9 meters per second, and was willing to try bat deterrent technologies, despite questions about whether or not they would work for the site. "We want to do the right thing. We want to reduce bat mortality," she said. But when it came to the recommendation to curtail operations at night to avoid excessive bat take, she balked.

"We can't shut off the wind turbines at night; otherwise, we're a solar farm," she said.

She said she submitted a comment letter to the ESRC advocating for more industry involvement in the development of the guidance document. "It's going to be important to understand the practicability of the recommendations," she said.

Another meeting participant asked how the guidance document, if adopted, would be used.

"If this is rule-making, we should be explicit. I would like to see something in the document saying it's not a rule. … It looks like a regulatory document, not a guidance document,' he said.

Bogardus said that the original 2015 version was never intended to be part of rule-making, but was to serve as a guide to help avoid delays in decision-making. "It was always open if people wanted to pose other things. … The committee would have to discuss that. We saw that happen. At the end of the day, it's guidance. It was never intended to be, 'thou shalt do it this way,'" she said.

"This has been one of the hardest issues the Fish and Wildlife Service and DOFAW and ESRC faced," she said, and praised the industry for its role in supporting all of the new research on bats. "Is it everything we need? No. Is it everything we want it to be? No, but it's a hell of a lot more than they knew a few years ago," she said.

Smith said he wanted to continue discussions among all the parties, both inside and outside ESRC meetings. "We've got the regulatory stuff dealt with for the time being. Hopefully, we can be more proactive," he said.

— Teresa Dawson

BOARD TALK

Wai'oli Taro Farming Hui Wins Permit, Perpetual Easement for Ancient 'Auwai

Nearly a year ago, the Board of Land and Natural Resources granted a 55-year easement and a right-of-entry permit to allow a non-profit group of Hanalei taro farmers to repair and maintain the ancient, pre-contact Hawaiian irrigation system that they rely on and which was destroyed by devastating floods in April 2018.

The farmers, who formed the Wai'oli Valley Taro Hui, Inc., produce the vast majority of the state's locally grown taro, and many of them come from families who've tended the fields there for generations.

Ian Hirokawa of the Department of Land and Natural Resources' Land Division explained at the board's May 24, 2019, meeting that Kaua'i County had been working with the farmers to remediate the damage, which includes a diversion along Wai'oli Stream that lies on state land.

The county was going to assist with the initial repair, but since the system is largely on state land, the Land Division worked with the farmers on an easement to give them the ability to maintain the system, Hirokawa said.

With regard to the taro farmers' use of water from that system, Hirokawa did not propose issuing them a revocable permit or water license at that time. He said the state would work with the farmers on eventually issuing some kind of disposition for the water, but wanted to first provide an opportunity to repair the system, a portion of which — the manowai, or intake — is designed to break apart after heavy rains.

While the farmers would have preferred a perpetual easement, rather than a term easement, the board could not grant one that day because it had not been noticed in the agenda to allow for the change. But on February 28, Hirokawa brought a request to the Land Board to amend its May action to make the easement perpetual, enlarge the easement boundaries to reflect what had been surveyed, and issue a revocable permit for the group's water use.

Hirokawa asked that rent for the permit be free, given its unique nature, noting that the hui is a non-profit engaging in a traditional and customary practice. Traditional and customary Hawaiian practices are protected by the state constitution.

Land Board member Chris Yuen suggested that the permit probably should have been granted at the same time the easement was. Hirokawa explained that, at the time, the best path forward was unclear, given proposals before the Legislature that could possibly have had an impact.

Yuen asked whether the hui's permit would be lumped in with all of the state's other water use permits when it comes time for their renewal.

Hirokawa said that was one option. He noted that last year, a bill before the Legislature included a permitting exemption for taro irrigation. That bill failed, but such an exemption could be included in a bill this year. "We'll see how things play out at Legislature," he said, adding that his division would do whatever it could under the law that would be appropriate.

PHOTO: HAWAII DEPARTMENT OF AGRICULTURE

Hanalei taro fields

Kaua'i Land Board member Tommy Oi argued against bundling the hui's permit with the several other water use permits that the board has been renewing every year. Those other permits are wrapped up in a controversy, stemming from a 2016 circuit court decision regarding the legality of the Land Board's annual renewal of revocable permits (RP) for water.

"People, the public, has issues with the other RPs [for] KIUC [Kaua'i Island Utility Cooperative] and East Maui Irrigation. This might, if you bundle it with that, it might delay [the taro farmers] from doing anything," Oi said.

DLNR director and Land Board chair Suzanne Case said the farmers will need to get a water lease eventually. "What we're trying to do here is fit an old system into a new legal system," she said.

"Based on measurements conducted by the staff of the Commission on Water Resource Management, the amount of water diverted for taro irrigation is approximately 10.07 million gallons per day (mgd), against a flow of Wai'oli Stream measured at 21.14 mgd," Hirokawa's report to the board states.

Hui president Reid Yoshida, whose family has lived in Hanalei for 125 years, explained that the farmers' use of the water is non-consumptive and that any seepage from the system works its way into the water table.

After the 2018 floods, the huge boulders that had filled the manowai made it almost unrecognizable, he said.

"Our entire water supply was cut off [and] we actually did something that the members typically don't ever do. We actually asked for help. We were fortunate the community got together, there are people that came from all over the island. Everyone was hand-digging debris out of the 'auwai trying to restart the flow. We were able to get the flow back to the farms, but it's minimal. It's barely enough to keep the farms going," he said.

The farmers also lost a lot of equipment to the floods. Yoshida said two of his tractors and his lawn mowers were under water, and his chain saws were washed away.

With all of the silt that was deposited in the taro fields by the floods, Yoshida said his production dropped by 40 percent. The combined hardships forced him to return to his previous job as an engineer, but one day, he hopes to return to farming full time. "I'm not going to give up

Continued on next page

my farm. I'm never gonna give up my farm," he said.

To make sure that farming is even possible in the future, he said that the hui needs to be able to respond to weather events. "It doesn't have to be a major storm. It could just be a rainy week. The river will change its course, so we're constantly going up there just to try to chase it, just to make sure we have a little bit coming through our fields.

"For the Wai'oli Valley Taro Hui, all the farmers go back so many generations and we all know each other. Last year we finally formally organized … so we could protect and restore the resources Wai'oli provides for us," he said.

"If something were to happen and we cannot go back and repair that system, I'm afraid that we if we have something even half as bad as what happened in April [2018], that water system could be damaged to the point where taro farming in Wai'oli might stop. There's certain areas, if we get any more damages, I don't think we could recover. Maybe it might be where taro farming stops, and then it's couple years to fix it and everyone has to start all over," he continued.

Yoshida said returning to farming would be carrying on the legacy his grandfather started for his family 100 years ago. "I'm hoping there's a next generation that's going to take it over, but without the water, that next generation won't have the opportunity," he said.

Yuen said he hoped the paperwork in the future is not too horribly difficult. "It tends to be whenever the word 'water' pops up," he said.

Kapua Sproat, director of Ka Huli Ao Center for Excellence in Native Hawaiian Law and the Environmental Law Clinic at the University of Hawai'i, said that the farmers have done everything right. Some of her students have aided the hui in navigating the government approval processes to repair the system. Once all necessary approvals are in place, restoration can be made in earnest, she said.

"Might there be a need for other state land because the river changes?" Yuen asked.

Sproat replied that was possible, but what's in the amended easement is sufficient for now.

She added that the hui is also looking to help steward the upper watershed. She said that since the board first granted the easement, there's been a significant amount of damage, in part, due to invasive albizia trees. "Now, when there's a big wind, it's horrible up there," she said.

Land Board member Sam Gon said, "It would be an amazing thing to partner with some efforts that try to remove non-native trees from that area and replant native species that are more resilient and more adaptive to the upper watershed. And that may be cooperative programs with DOFAW [the state Division of Forestry and Wildlife] or other organizations."

"That's precisely why I think the hui decided to pursue a non-profit … because we realized what a significant kuleana this is and we are already pursuing partnerships with Malama Kaua'i and others. We'd be happy to work with DOFAW or anyone else," she said.

The board unanimously approved the easement amendments and the revocable permit.

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Board Approves Hearings On New State Park Fees

On February 28, Curt Cottrell, administrator for the Department of Land and Natural Resources' Division of State Parks, asked the Land Board for permission to hold public hearings on proposed fee increases for parking, entry, and facility uses.

He noted that his division had not increased fees in 20 years. "This is a long time in coming for us. We're charging fees established 20 years ago. …We haven't done a substantive fee change since that time," he told the board.

With aid from a legal fellow and deputy attorney general Colin Lau, the division proposed new fees that Cottrell said would greatly increase the division's ability to repair, maintain, and secure its parks.

"I really wish we would have done that several years ago. Not having a legal fellow, it was really challenging to get the capacity to do this. Once tourism popped, there was a lot of revenue being hemorrhaged over the last several years that we could have collected to have enhanced our operations," he said.

He noted that 80 percent of his division's $14 million annual budget goes to salaries or lifeguard contracts, leaving just $2.8 million for everything else.

Last year, the division spent $536,000 on repair and maintenance, which is just a small fraction of its $40 million backlog. Cottrell added that it is also contracting more and more with the department's enforcement officers to deal with after-hours security issues.

"Now, with charging for parking and entry, we generate $2.9 million a year … $1 to walk in, $5 to drive in, staggered fees for buses," he said. With the new fees — which he assured the board would not be applied to all parks — "we stand to make, top-end, minus coronavirus and natural disaster, we could get up to $8.7 million in revenue just from parking and entry, just from a modest increase from $1 to $5, $5 to $10 and an increase in the bus tour calculations," he said. A proposed 25 percent increase in camping fees would also help bump up total revenue by about half a million, he estimated.

The rule package did not exclusively seek fee increases. In the case of Diamond Head State Park on O'ahu, which is the only state park where both residents and non-residents pay an entry fee, the division proposes eliminating the fee for residents. Cottrell explained that the income generated from the resident fee there is minimal. Even with the elimination of that fee, he added that income under the new rules, if adopted, was expected to increase to $4 million a year. "That money can be spread throughout the park system," he said.

With regard to parks that are currently free to the public that would not be under the proposal, he said that because his division would need to hire a contractor to manage fee collection, the park would need to have enough traffic for the contractor to make money. He said that any such contract to set up a parking and entry scheme similar to what's at Iao, Waimea, Koke'e, Akaka Falls, or Diamond Head would need to be approved by the Land Board.

He added that his division will be focusing on places such as Wainapanapa in East Maui, which, similar to Ha'ena on Kaua'i, has seen an "explosive amount of tourism and commercial use in a community where we have a park unit that's attracting them."

And just as with Ha'ena State Park, his division will be looking to reduce the patronage. "In some of these parks, we're going to be trying to shrink down the use

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to find a more reasonable balance between tourism and community value," he said.

If the Legislature grants the division's request to increase the spending ceiling on its special fund by $2 million, and if the fee increases go into effect, "for us it'll be drinking out of a firehose. We're not used to having this kind of operating capital," he said.

If everything goes as planned, the division will be investing in the quality of its camp sites and hiring Division of Conservation and Resource Enforcement officers for "special duty ops" regarding the homeless, illegal camping, and itinerant taxi drivers at Diamond Head, he said.

Cottrell cautioned that natural disasters may greatly affect the income projections.

In 2018, Kaua'i was hit with devastating rains and suffered massive flooding. As a result, "we hemorrhaged about $800,000 of camping revenue at Kalalau because we had to stay closed for 14 months," he said. The income projections he presented are "all going to be subject to fluctuations based on landslides, storms … The coronavirus is a new type of issue that may have some incalculable impacts on our ability as time goes by," he said.

The board approved the request to take the rules to public hearings.

A few weeks later, on March 18, the DLNR announced the closure of several parks under its jurisdiction to prevent the spread of the coronavirus. Two days later, it closed all of them.

Cottrell said in a March 20 press release, "many, many people are simply ignoring gates and signs and choosing to put themselves and any others close-by at risk of contracting COVID-19. This unprecedented step is being taken in the interest of public health and safety and we really encourage people to find alternate activities that do not expose themselves and others to the virus."

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More Maximum Fines For Illegal Vacation Rentals

Had Christopher Arai and his wife been made aware that short-term renting was not allowed at their beachfront house in South Kona, they wouldn't have bought it, he wrote in a letter to the Board of Land and Natural Resources last month.

On March 13, the board voted to fine him and his wife, Tess Marie Lusher, $17,000 for illegally using their house as a vacation rental, in violation of state Conservation District rules, as well as the Conservation District Use Permit the board granted for the house in 1994.

The California-based couple likely earned a small fortune over the 14 years that they owned the beachfront home, which they named "'Ili'ili House," since it overlooks Pebble Beach ('Ili'ili means pebble in Hawaiian).

They bought the home for $875,000 in early 2006, and began advertising it for rent that year. Although their general excise tax and transient accommodation tax licenses weren't issued until 2013, guest reviews on the vacation rental website VRBO date as far back as June 2007, when a single stay cost at least $1,600 (five-night minimum at $285/night, plus a $175 cleaning fee).

Prices increased over the years. By 2012, a five-night stay cost $1,675, although the minimum stay was reduced to three days for $1,1,00 plus the cleaning fee. A week during Christmas or Easter that year cost $2,400 plus the cleaning fee.

In November 2018, Hawai'i County adopted an ordinance restricting where transient vacation rentals could occur on the island. However, the new rule allowed for existing operators whose properties are outside designated areas to apply for a nonconforming use certificate.

According to state tax records Arai and Lusher submitted to the county as part of their application for a certificate for their property, 'Ili'ili House generated about $258,229 in income just between 2015 and the end of 2018.

Arai noted in his letter that when he initially attempted to submit his nonconforming use application to the county in person last August, he was told he needed to contact the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL). The county has referred applications for properties in the Conservation District to the OCCL, which has then been pursuing maximum fines for the illegal rentals.

By phone and in an email, OCCL staff informed Arai in late August that vacation rentals are prohibited on his property.

"This was extremely shocking news. It destroyed our vision for the property," Arai wrote, adding that he has stopped doing rentals there and had only family and friends stay since September.

Even so, he submitted his nonconforming use certificate application to the county by the September 28 deadline, hoping to secure the certificate and figure out later how to "correct the situation with the DLNR."

"At that time, I had no idea how difficult that would be and I was still under the hope that this could be rectified. I was not planning to continue renting with the [certificate] alone," Arai wrote.

Arai's explanation came in response to the OCCL's recommendation at the Land Board's March 13 meeting that the board impose not only the maximum $15,000 fine for the illegal vacation rental and $2,000 in administrative costs, but an additional $5,000 for filing for a county nonconforming use certificate after the OCCL informed Arai that rentals were prohibited.

"Our position was they were notified and they seem to have gone ahead anyway," OCCL administrator Sam Lemmo told the board.

While Arai, in his letter, asked the board to reduce all of the fines, the couple's attorney, Onaona Thoene, testified that they were willing to accept the fines for the vacation rental violation and administrative costs. However, she argued that DLNR rules don't allow the board to impose a fine simply for submitting an application to the county.

She explained that Arai and Lusher had only submitted the application to preserve their rights while they researched the state's district boundary amendment process, "which they thought would then allow them to continue the transient rental of the property."

Thoene added that the couple is pursuing claims with their title company. Although the CDUP for the home was recorded in the Bureau of Conveyances, "title didn't pick it up," she said.

Land Board member Chris Yuen recommended approving the OCCL's recommendations, except for the $5,000 fine for filing the county application. "It doesn't sound like they were just trying to do an end-run," he said.

While the rest of the board agreed with Yuen's recommendation, board member Sam Gon said he was glad the OCCL had included the $5,000 fine recommendation. "Every case has to be considered independently," he said. ***— T.D.***

'Aina Le'a Asks Court to Overrule County on Requirement for New EIS

Here we go again.

The owner of 'Aina Le'a, the 1,060-acre tract of land in the Big Island district of South Kohala slated since 1989 for an enormous housing, commercial, and golf-course development, is now suing Hawai'i County and its planning director, Michael Yee, over the Planning Department's insistence that a new environmental impact statement (EIS) be prepared before any further work can be done at the site.

In 2013, a state court determined that the county could reject an earlier EIS done for the project and accepted by the county in 2010. In that case, the Mauna Lani Resort Association had sued the county over its acceptance of an EIS that had been prepared without consideration of a side agreement reached between the developer, DW 'Aina Le'a (DWAL), and Bridge 'Aina Le'a, LLC. DWAL had signed a development agreement with Bridge that committed DWAL to building infrastructure that would also benefit Bridge, which owns the land on the north, east, and south borders of DWAL's land. (The Queen Ka'ahumanu Highway makes up the boundary to the west.) But the EIS did not address any of the environmental impacts of that adjoining development.

Because of that agreement, known to exist but undisclosed to the county until the litigation was brought, 3rd Circuit Judge Elizabeth Strance found that the county was wrong to accept the final EIS.

The most recent litigation has been brought by Lulana Gardens, LLC, a Delaware-registered business that is wholly owned by 'Aina Le'a, Inc. Lulana Gardens is the name of that portion of the development designated for affordable housing (affordable as defined by county standards, anyway).

According to the lawsuit, filed in 3rd Circuit Court on March 10, Lulana Gardens "owns and has rights in real property," specifically, the approximately 38 acres where DWAL had begun a decade ago to build 385 townhouses to satisfy state Land Use Commission conditions regarding affordable housing. Yet there is no public evidence, either in state or county records, that Lulana Gardens has any ownership interest in the property.

County tax records show there has been no change in ownership since 2012. At last count, ownership was held by more than 1,000 individuals, plus 'Aina Le'a, LLC (a Hawai'i entity that was involuntarily dissolved by the state last December, for failure to file annual reports three years in a row). Those individuals, all of whom reside in Southeast Asia, purchased Undivided Land Fractions (ULFs) in the 38-acre parcel and an adjoining 24-acre parcel as 'Aina Le'a sought to raise capital in an innovative manner. In other legal filings, 'Aina Le'a has stated that those individual owners have assigned their rights to develop the properties over to a trust. The most recent lawsuit makes no mention of that.

The Lawsuit

At the heart of the current litigation is the claim that because the matter of the sufficiency of the 2010 EIS was remanded to the county, the court made no determination itself about the EIS.

"Regardless of what the County of Hawai'i planning director, accepting the Final Environmental Impact Statement, did or did not 'look at,' the legal question before the circuit court … was whether, in the *circuit court's* judgment (and *not* the County of Hawai'i planning director's judgment), the Final Environmental Impact Statement is legally 'adequate,'" Michael Matsukawa, attorney for Lulana Gardens, argues in the complaint.

"A plain reading of the circuit court's March 28, 2013, order shows that the circuit court did *not* conclude that … [the] final Environmental Impact Statement is legally 'inadequate,' in the absence of such a conclusion, the circuit court's March 23, 2013, order must be interpreted to mean the final Environmental Impact Statement is legally *'adequate.'*"

While the judge's final order in that case does not specifically say whether the EIS was inadequate, here's what it does say:

The court "GRANTS Plaintiff Mauna Lani Resort Association's motion for summary judgment against Defendants County of Hawai'i and Bobby Jean Leithead-Todd, director of the County of Hawai'i Planning Department … and Defendants DW 'Aina Le'a Development, LLC, and Relco, Corp. ('DW') on the limited grounds that the County of Hawai'i did not fully evaluate the relationship between DW and Bridge 'Aina Le'a, LLC, … and thereby was unable to give a hard look, as required by Hawai'i Revised Statutes ('HRS') Chapter 343 and Hawai'i Administrative Rules ('HAR') chapter 11-200, at either (1) whether the project proposed by DW was a segment of a larger project or (2) whether there were cumulative impacts which were not fully analyzed."

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Starting Over

"All development on the project is tolled," Judge Strance ordered in 2013, a statement that seems clear enough on its face.

However, over the next couple of years, the county relented somewhat. "After the court order was issued in 2013, the department received two inquiries requesting to know whether the county would honor building, plumbing, and electrical permits that had previously been issued to construct the townhouse units," Planning Director Michael Yee wrote to an attorney for 'Aina Le'a and Bridge in 2017, recapping events that had transpired in the four years since Strance's ruling.

In letters to the developer in 2014 and 2015, Yee wrote, "the department acknowledged the appropriate permits for twelve townhouse buildings known as Lulana Gardens were legally issued and consistent with land use approvals at the time they were issued."

Yee continued, "The department indicated the county would continue to honor these permits provided that vesting of those approvals be consistent with prevailing county and state requirements. The department clarified that this determination was conditioned on the facts as the department knew them, and that no commitment or guarantee with regard to additional permitting or approval requirements would be made. … **These letters were written with the understanding that an SEIS was being prepared by 'Aina Le'a to comply with the court order"** (emphasis in original). (An SEIS is a supplemental environmental impact statement – something that, in this case, would expand the scope of the 2010 EIS while relying on many of the same studies prepared for that document.)

"There is no indication that 'Aina Le'a intends to complete the SEIS before proceeding with construction of the project," Yee noted.

And yet 'Aina Le'a was continuing to conduct work on the subject properties, Yee wrote, "which violates the court's order. The Planning Department requires that the Applicant **immediately cease all work,** including but not limited to ground disturbance such as trenching and grading; grubbing and stockpiling; and construction on the subject properties. … Work shall be prohibited on the property until a Final Supplemental Environmental Impact Statement has been accepted by the department."

> *"There is no indication that 'Aina Le'a intends to complete the SEIS before proceeding with construction of the project."*
>
> ***— Michael Yee, Planning Director***

By February 2018, the Planning Department had determined that an entirely new EIS would be required. On receiving information from Bridge and after consultation with the state Office of Environmental Quality Control and the Land Use Commission, Yee informed Belt Collins, consultant for Bridge, "we have determined that a new EIS is needed … covering the 3,000-acre project site" (the 1,060 acres held by 'Aina Le'a plus the 1,940 held by Bridge). The scope of the action considered in the 2010 EIS "has significantly changed due to modifications in the conceptual master plan [2010] and the new proposal to reclassify 2,000 acres of [Bridge-owned adjacent] land to the state Land Use Rural District."

Bankruptcy

In June 2017, 'Aina Le'a, Inc., filed for bankruptcy court protection. The fact that there was no approved EIS for 'Aina Le'a's planned development meant that the company's main – and basically, only – asset, the land, was not nearly so valuable as it might be.

In early 2019, Robert Wessels, CEO of 'Aina Le'a, informed the bankruptcy court that he had been in talks with the county Planning Department in an effort to "resolve the tolling order" issued by Judge Strance. With those talks bearing no fruit, the committee filed in 3rd Circuit Court a petition to intervene in the court case settled six years earlier.

That effort went nowhere.

Soon after that, 'Aina Le'a was back at the Planning Department, attempting to win approval of a draft environmental impact statement preparation notice (EISPN).

Again, no joy. Beginning in August, Wessels submitted a series of draft EISPNs, in hopes of getting started again on the EIS process. None was deemed satisfactory by the county. On January 21, Yee informed Wessels that the Planning Department was rejecting the fourth such draft, submitted in November, "due to the deficiencies noted in our letters to you dated August 13, 2019, September 9, 2019, and October 31, 2019, which have not been corrected and addressed."

"The tolling/stop work order effective May 16, 2017, is still in full force and effect per our letter to your previous attorney … dated March 5, 2019," Yee added.

Wessels apparently gave up on efforts to win county approval of the EISPNs, which had been prepared by a landscaper with no prior experience with environmental planning.

Less than two months later, he turned his efforts back to the 3rd Circuit Court. With that, the dispute over the EIS had now come full circle.

— Patricia Tummons