Volume 27, Number 11 May 2017

Environment Hawai'i
a monthly newsletter

Will the Lights Go Out At GEMS?

For a program that has been charged with such an important task as democratizing rooftop photovoltaic and other energy efficiency technologies, the Hawai'i Green Infrastructure Authority has largely operated in the dark.

What little light has been shed on the HGIA's stewardship over the Green Energy Market Securitization (GEMS) fund may well grow even dimmer if Public Utilities Commission oversight is taken away, as one legislative measure is proposing.

Should that happen, review of the HGIA's actions by the consumer advocate will vanish.

IN THIS ISSUE

Bill Intended to Alter GEMS Program, Reduce Oversight, On Brink of Passage

With a piddling fraction of a $146 million Green Energy Market Securitization (GEMS) fund being loaned out over two years, it is easy to understand legislators' frustration with the program.

But will a new measure that the Legislature is poised to pass fix the problems that have beset GEMS? Or will it make things even worse by eliminating most of what little public oversight exists for the troubled program?

Gwen Yamamoto Lau, who heads up the Hawai'i Green Infrastructure Authority (HGIA) tasked with distributing GEMS loans, has made no secret of her belief that the agency has been hobbled by the requirement that the state Public Utilities Commission (PUC) approve the various loan categories that qualify for GEMS funding.

Yamamoto Lau is the third executive director of the HGIA in two years and was appointed to her post only in January. Since last May, she had been HGIA's managing director and since September, following the resignation of Tara Young, she had been acting executive director.

In March, she filed HGIA's annual plan for fiscal year 2018 with the PUC, in which she stated flatly that commission oversight was "the last remaining impediment hindering the authority's ability to react in a nimble and timely manner to market changes and demands." The PUC's docket process was "lengthy, expensive, and burdensome," she said, and had "resulted in missed market opportunities for [photovoltaic] and [non-photovoltaic] related products."

Legislation that was in conference committee at press time would free Yamamoto

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Environment Hawai'i

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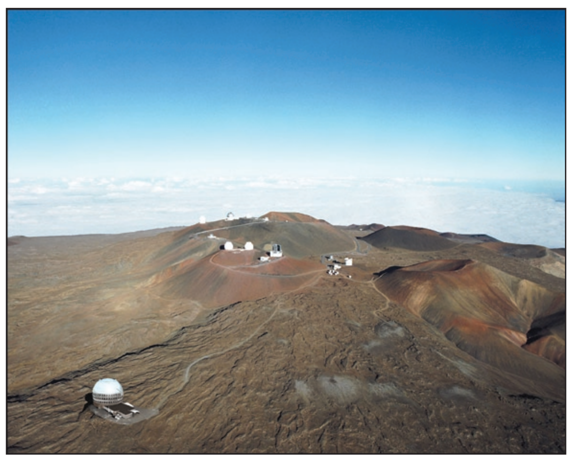
NEW AND NOTEWORTHY

'Aina Le'a Update: DW 'Aina Le'a, LLC, which owns 1,072 acres of land near Waikoloa, on the Kohala coast of the Big Island, is suing the state of Hawai'i for $200 million as a result of actions by the Land Use Commission in 2010 and 2011, when the LUC voted to revert the land to the Agricultural land use district. The land had been upzoned to the Urban district two decades earlier, but the LUC was not satisfied with the progress in developing required affordable housing units and therefore voted in favor of the reversion.

Within days of the lawsuit being filed in Hawai'i's 1st Circuit Court, the state had the case removed to U.S. District Court in Honolulu. On March 22, the state moved to have the case dismissed, on the ground that the statute of limitations had passed for filing such a claim years ago.

"The allegations in plaintiff's complaint establish that the last possible day the takings claim could have accrued was April 25, 2011," wrote deputy attorney general William Wynhoff in the motion for dismissal. "Faced with a two-year statute of limitations, plaintiff was required to file a takings claim by April 25, 2013. Plaintiff failed to file such a claim until February 23, 2017, almost four years too late. The sole takings claim is, therefore, time-barred as a matter of law, and this Court should dismiss the complaint with prejudice."



Artist rendering of completed TMT site.

TMT Update: March 2 was the last day testimony was taken in the contested case hearing over the Conservation District Use Application for construction of the Thirty Meter Telescope. It took more than six weeks – until April 18 – for the 44 volumes of transcripts of the proceedings to be prepared and delivered to public libraries on the Big Island and the main state library in Honolulu.

The hearing officer, retired judge Riki May Amano, has now set a deadline of May 30 for the parties to the case to complete their proposed findings of fact, conclusions of law, and decision and order. Responses to proposed findings are due June 13.

On April 16, Easter Sunday, Tim Lui-Kwan, one of the team of attorneys for the applicant, the University of Hawai'i, died while swimming near Kaimana Beach on O'ahu. Taking his place is Lindsay McAneeley, who will join the two other team members, Ian Sandison and Pete Manaut.

Big $ For Whitmore Hub: If the state Senate gets its way, Dole Foods, Inc., will be lined up to receive $20 million in state funds for lands it has put up for sale in Central O'ahu.

When the governor's budget (House Bill 100) was first introduced, it did not include any funds for further acquisitions of land in the Whitmore area of O'ahu, which Sen. Donovan Dela Cruz and the state Agribusiness Development Corporation are trying to turn into the island's agricultural hub. Last year, the state Legislature authorized, and the governor approved, the expenditure of $31.5 million to acquire land in the area (also owned by Dole) to support their vision. That's on top of the tens of millions that have already been spent acquiring nearly 2,000 acres from Dole, Castle and Cooke, and the former Galbraith Estate.

In late March, the Senate Ways and Means Committee (Dela Cruz is its vice chair) inserted into HB 100 a number of pricey capital improvement projects, including $4 million for a packing and processing facility at Whitmore Village, and $20 million to purchase 500 acres from Dole "to lease to local farmers, decreasing the State's dependence on imported agriculture products," a committee report states.

Quote of the Month

"[T]he health of the stream must be preserved at all times."

— *Waimea Watershed Agreement*

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $65 individual; $100 non-profits, libraries; $130 corporate. Send subscription inquiries, address changes, and all other correspondence to
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Twitter: Envhawaii

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: Frances Officer

ISSN 1050-3285

GEMS Reporting Requirements May Disappear If HGIA Has Its Way

The Hawai‘i Green Infrastructure Authority (HGIA) is required to deliver quarterly reports on its progress in distributing Green Energy Market Securitization loans and advancing the state's goals of energy independence to the Public Utilities Commission (PUC).

If House Bill 1593 becomes law, that will likely change and the authority will be free from the oversight provided by the PUC process, including the consumer advocate's mandatory review of proposed changes in GEMS loan programs.

The reports to the PUC have provided one of the few windows into the HGIA's activities and the GEMS loans it's distributed. However, even they have been fraught with contradictions and blunders. In one quarterly report last year, amounts loaned out were recorded as debits (program expenses) instead of as assets (accounts receivable).

The HGIA's most recent report — for the third quarter of fiscal year 2017, which ended March 31 — shows an astonishing increase over the previous quarter. As of December 31, just 33 residential loans were identified as being "approved and committed," with a total loan value of $1,098,310. Three months later, there were 1,229 "committed" loans with a total value of $10,521,128, nearly a 10-fold increase.

The increase may be the result of an evolving definition of "committed." A footnote to the second-quarter report defined "approved and committed" as loans "that have been approved with executed loan documents… There are no conditions pending. The contractor has begun work."

The third-quarter report defines "committed" more loosely: "This category includes loans that have been approved with executed loan documents with solar systems in the process of being installed as well as $9,600,000 committed to install 1,200 solar hot water systems on Moloka‘i."

The Moloka‘i Project

Details of the proposed Moloka‘i loans are absent from the report. Minutes of the HGIA show that the project was approved at the authority's January meeting, with HGIA board member Jeff Mikulina, executive director of the Blue Planet Foundation, recusing himself from the vote, since Blue Planet is somehow involved in the project.

In discussions at HGIA meetings, the solar water heating project is said to involve Sust‘ainable Moloka‘i, the Blue Planet Foundation, and Hawai‘i Energy, administrator of the Public Benefits Fund nourished each month with HECO ratepayer fees. In response to a written question about the project from *Environment Hawai‘i*, HGIA administrator Gwen Yamamoto Lau replied, "The recipients of the loans will be the individual ratepayers (i.e., homeowner or renter) who apply for financing to install solar hot water heaters."

The PUC has not approved financing of solar water heaters with GEMS funds. Hawai‘i Energy does, however, have a program that encourages installation of solar water heaters; according to its website, the Hawai‘i Energy rebate, along with state and federal tax credits, can total nearly 70 percent of the system's purchase price in the first year. That's in addition to monthly electric bill savings of up to 40 percent.

Yamamoto Lau was asked whether GEMS financing of solar water heaters duplicated Hawai‘i Energy's program.

She said it would not. Hawai‘i Energy is limited to providing $500 rebates for eligible solar hot water equipment, she said. The HGIA "is collaboratively working with Hawai‘i Energy to enable the installation of these energy efficiency measures by providing the financing needed for solar hot water heaters," she said.

Aside from HGIA approval, PUC approval is also needed for a loan program to fund residential energy efficiency (including solar water heating) and an on-bill repayment plan that will allow purchasers to amortize the loan over 18 years. In addition, "Each individual loan will need to meet the authority's on-bill product requirements," the report states.

At the April 21 HGIA meeting, Yamamoto Lau told board members she expected that "on-bill repayment will go live in December. We're going to start taking applications in July. Then we'll process it as if it's an on-bill repayment but it will be direct-billed through Concord. Once on-bill repayment goes live, it will show up on bills." Concord Servicing handles billing for the GEMS loans.

(Sust‘ainable Moloka‘i was registered as a nonprofit with the Hawai‘i Department of Commerce and Consumer Affairs in 2011. The DCCA now lists it as not in good standing for failure to file a current annual report.)

Totals

Altogether, the third quarter report states, 49 residential GEMS loans have been made. Thirty-nine have been to O‘ahu homeowners, nine have gone to Maui, and one to Hawai‘i island. Total value of the residential loans is $1,681,117.

A total of four commercial GEMS loans have been funded, the report states, with a loan value of $1,149,863; just two of those, however, have been "approved and committed," with a loan value of $588,403.

Of the 33 residential loans that Yamamoto Lau counts as having been funded in her third-quarter report, just three fall into the category of very low income (30 percent to 50 percent of the area median income, or AMI) and nine into the low income category (50 percent to 80 percent of AMI). Seventeen fall somewhere between 80 percent and 140 percent of AMI, which is in the category of moderate income, while four have household incomes above 140 percent of AMI.

The report states that nearly 90 percent of the loans go to underserved households, including those with annual incomes of $100,000 or more. Yamamoto Lau explained how her agency arrived at this figure. Based on guidelines developed by the Hawai‘i Housing Finance and Development Corporation, Yamamoto Lau stated, "a seven-person household with an aggregate gross income of $110,000 would be considered a moderate-income household with >90 percent AMI. Many of our borrowers have large families with five or more persons living in their households."

The credit-worthiness of loan recipients is similarly skewed to the higher end of the range, with 23 of the 33 loans going to those with FICO scores of 675 or higher.

In the annual plan for fiscal year 2018 submitted to the PUC in late March, Yamamoto Lau said that 269 households that are renters have benefited from GEMS loans. This was based on the number of units in the 7000 Hawai‘i Kai Drive apartment complex, which so far has been the beneficiary of the largest single GEMS loan — $861,500 — that the HGIA has approved.

Only 54 units in the complex are earmarked for low-income households, however — households where income falls below 80 percent of the area median income.

But the PV installation financed with the GEMS loan provides energy only for common areas, not units occupied by any of the renters. There is no evidence that rents have been reduced to reflect the building

Under House Bill 957, DOE Would Get Millions in Interest-Free GEMS Loan

House Bill 957 has been enthusiastically supported by the Department of Education (DOE), the teachers' union, parents, contractors, and others too numerous to list here. It calls for allowing up to $46.4 million in Green Energy Market Securitization funds to be loaned to the Department of Education to continue the "cool schools" initiative that began last year with the appropriation of $100 million for energy efficiency and other measures that would be used to lower temperatures in classrooms.

The bill would also appropriate general funds to pay for interest on the loan for the first year.

Gwen Yamamoto Lau, executive director of the Hawai'i Green Infrastructure Authority (HGIA), testified that her agency strongly supports the measure, "so much so, that it has been working in concert with the DOE, B&F [Budget and Finance] and Hawai'i Energy and has already submitted a request to the [Public Utilities] Commission to approve EE [energy efficiency] retrofits for the DOE."

On February 22, the commission authorized HGIA to loan up to $60 million to the DOE for installation of energy efficiency and heat-abatement measures that could reduce the department's energy consumption and electrical bills.

Yamamoto Lau noted that the DOE's Ka Hei program, specifying energy efficiency measures for schools, "has identified almost $60.0 million in EE retrofit opportunities." The HGIA "is not contemplating financing 100 percent" of this, she added, "due to its mandate for 50 percent of the [GEMS] funds to benefit the underserved." Still, reducing the DOE's energy consumption by 25 percent, as this measure is intended to do, "could significantly and positively contribute to the achievement of Hawai'i's Energy Efficiency Portfolio Standard."

Public Utilities Commission chairman Randy Iwase took no position on GEMS funds supporting cooler schools. However, he expressed concern that the measure provided a general fund appropriation only for the initial loan repayments. "If funds are not also provided for loan repayments behind this initial period, there could be unintended consequences, including increased surcharges [on ratepayers] and limited ability to achieve the statutorily required energy efficiency portfolio standards," he said.

Ray Starling, chairman of the Energy Efficiency Working Group of the Hawai'i Energy Policy Forum, said the forum was unable to reach a consensus on the bill but expressed the group's similar concern about where the remainder of the loan repayments would come from. "Since GEMS funds come from bonds secured solely by electric utility ratepayers rather than taxpayers, if the proposed loans are not paid by the state beyond the 'initial' payment, ratepayers would be on the hook to make up any shortfall. The state should obligate itself to make all repayments on any DOE/B&F loans from the GEMS program," he stated.

By the time HB 957 made it through the Senate, it had been amended to require the DOE to repay the loan by using funds "saved by the reduced utility costs that result from energy-efficient lighting and other energy efficiency measures." At the same time, however, the Senate required that the loan be interest-free.

The measure was still in conference committee at press time.

At the HGIA's April 21 meeting, some members wanted to know if there were any problem with the interest-free provision of HB 957.

Gregg Kinkley, the deputy attorney general assigned to the agency, replied, "The only way for bills like this to have a constitutional infirmity is if they violate the constitution on its face. There may be policy issues involved, but as long as all the changes are consistent and the bond-holders aren't impaired, and debt service isn't touched, it's not unconstitutional. All the rest is policy. In terms of legality, it's not illegal on its face."


Luis Salaveria

HGIA chair (and director of the Department of Business, Economic Development, and Tourism) Luis Salaveria said that some analysis had already been done on a loan to the DOE. "Under the original analyses, … it still resulted in $5 million of actual savings to the DOE in ongoing operating costs."

Yamamoto Lau said that the estimated annual bill savings to the DOE is $8 million. "The estimated principal and interest would have been $4.7 million."

Salaveria added that, if the DOE is repaying only principal, "the savings could be greater, but at the authority's expense."

— P.T.

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owner's lower electrical bill. Yamamoto Lau said "renters of these multi-family projects benefit with lower common area utility costs." As a rule, residential rents do not include any separate fee for common area costs.

Bottom Lines

As of March 31, available GEMS funds stood at $141,691,260, with an additional $2,834,604 booked as accounts receivable. (Elsewhere in the report, the loan balance is given as $2,830,980; the discrepancy between the figures is not explained.)

Administrative and other costs of running the GEMS program came to $2,830,980.

The fund balance at the end of the reporting period stood at $144,525,864.

Even if House Bill 1593 passes and the requirement for quarterly reports, annual plans, true-up accounting, and other measures of GEMS performance to the PUC is eliminated, Yamamoto Lau said the HGIA would "still be required to be audited at least annually by a firm of independent certified public accountants and provide the results of this audit to the [Department of Business, Economic Development, and Tourism] and the PUC." She added that HGIA would still be subject to the state's Sunshine Laws enabling the public to attend board meetings, and that it will continue to post board meeting minutes on its website.

The HGIA does provide meeting notices on the state calendar website and also, as required by law, to individuals requesting agendas. However, few members of the public have ever attended an HGIA meeting; at the most recent one, April 21, no one but *Environment Hawai'i* was present.

The minutes are posted on a website: gems.hawaii.gov/learn-more/about-us, although as of press time, minutes for the March 10 meeting were missing.

As for the annual audits, they are not posted on the PUC docket website for HGIA (docket 2014-0135). Yamamoto Lau provided the FY 2015 and 2016 audits to *Environment Hawai'i* at our request.

— P.T.

GEMS from page 1

Lau and the HGIA from PUC oversight for the most part. In addition, it calls for an unspecified amount to be transferred from GEMS to a "clean energy savings jump start fund" that would be used to give rebates for qualified purchases of energy storage systems and support "energy education, energy demonstration projects for affordable multi-family rental projects, and credit enhancements such as loan loss reserves and interest rate buy-downs."

The bill was introduced by Justin Woodson of Maui, Della Au Belatti, Tom Brower, Chris Lee, Scott Nishimoto, and Takashi Ono of O'ahu, and Joy San Buenaventura of the Big Island.

"The failure of the Hawai'i green infrastructure loan program to achieve its intended result has resulted in most ratepayers paying for the program without reaping the benefits," the bill states in the initial, "findings" section. "Rather than obtaining immediate relief from high electric power rates, ratepayers are instead having to pay the debt service on a loan that is not being effectively deployed."

Judging from the volume and sentiment of testimony submitted, most of those weighing in on the bill as it moved through the House and Senate would agree.

Among them was Yamamoto Lau.

Yamamoto Lau has told legislators the HGIA "strongly supports" the measure, House Bill 1593. Others who provided favorable testimony include manufacturers, distributors, and installers of PV and energy storage systems. With the PUC having shut off opportunities for most Hawaiian Electric customers installing PV systems now to feed excess energy into the utility grid, storage systems have become a necessary element of rooftop PV.

If the bill as it stood at press time were to become law, it would change the fundamental structure of GEMS. Under the current structure, the bond floated for the GEMS program is to be repaid over the 15-year term by the people and businesses receiving the loans. The Green Infrastructure Fee that utility customers pay each month and which now pays interest and principal on the loan is actually diverted from the pre-existing Public Benefits Fee; it was the intention when the PUC approved the GEMS program that when the GEMS fund became self-sustaining — when payments from outstanding loans were sufficient to cover most of the $13-plus million in annual bond financing fees — the surplus Green Infrastructure Fees collected would return to the Public Benefits fund.

But the rebates and other activities that would be funded by the "clean energy savings jump start fund" involve no repayment, meaning that ratepayers will be underwriting the GEMS program to an ever greater extent.

Yamamoto Lau, however, has proposed changing it even more fundamentally, by turning the GEMS fund into "a revolving fund, from which payments collected are redeployed and reinvested into new loans." Should that happen, ratepayers alone would be responsible for paying down the principal and interest on the bonds. The language proposed by Yamamoto Lau to accomplish this was not included in the Senate rewrite of the bill.

As House-Senate conferees began negotiations, the measure contained no dollar amount that would be diverted to the new fund. Yamamoto Lau herself has proposed that this amount "be limited to a manageable level ($20.0 million)," while others have suggested transferring up to $50 million.

> *"Rather than obtaining immediate relief from high electric power rates, ratepayers are instead having to pay the debt service on a loan that is not being effectively deployed."* ***— HB 1593***

GEMS: Theory and Practice

Act 211 of the 2013 Legislature established the GEMS program. The measure called for the Department of Business, Economic Development, and Tourism to float a bond, secured by Hawaiian Electric ratepayers, that would be used to underwrite loans to those residents who were unable otherwise to afford rooftop solar systems and other energy-efficient technologies.

At the time, the beneficiaries were said to include renters, people with poor credit histories, and low-income homeowners.

In September 2014, the PUC approved the bond issuance, and by November of that year, the bond sale had been completed. Once the various fees associated with the bond float were paid, the state was left with around $146 million to distribute as loans.

A number of obstacles — many reported in earlier issues of *Environment Hawai'i* — prevented the GEMS funds from reaching the very populations that were supposed to be the beneficiaries. For one thing, the program was designed by DBEDT to "leverage" GEMS funds by drawing in institutional investors that sought to take advantage of tax credits for purchases of energy-saving equipment, such as rooftop solar. The amount of money available for loans would thereby be significantly increased, enlarging the pool of beneficiaries. Or at least that was the idea.

That leveraging process, involving as it did complicated arrangements with brokers, funding sources, and other intermediaries ("deployment partners," in the HGIA's terminology) bogged down. To date it is not clear that any of these efforts have panned out.

Another factor was the curtailment of the net-energy metering (NEM) option for residential rooftop solar by the PUC in late 2015. That changed the economics of solar significantly, dealing a blow to the installers from which they have yet to recover.

The first roll-out of a GEMS loan program came in early 2015. Yet it was not to benefit low-income homeowners but was instead intended to open up the loan program to large nonprofit organizations that might need – and qualify for – loans in a minimum amount of $150,000. The reason for launching the nonprofit loan package before all others was not really because there was an identified need for it, but rather because it would attract the third-party institutional investors – those whose capital would leverage the GEMS funds. (It hasn't worked: to date, no nonprofit loan has been issued by GEMS.)

By the time a residential loan program was approved, the writing was on the wall for net-energy metering. The first residential loans were finally issued in January 2016, four months after the PUC cut the cord on NEM.

Scapegoats

In the annual plan for fiscal year 2018, Yamamoto Lau casts a wide net when attempting to explain the disappointing performance of the GEMS program.

The authorizing legislation did not require or anticipate the complicated involvement of third-party investors that proved to be so hobbling. Their role was instead recommended by the private consultants that, in 2013 and 2014, assisted DBEDT in designing the program presented to the PUC.

Yet Yamamoto Lau lists as one of the "challenges" facing GEMS "the complex and innovative nature of the financing products needed to implement and roll-out the GEMS program."

There was also the "unanticipated" loss

of the tax-equity partner for the nonprofit and small business loans, she noted. This "resulted in the termination of these programs on December 31, 2015, just nine short months after its [sic] launch."

In addition, Yamamoto Lau points to "low consumer adoption" of GEMS loans, a result, she says of an "uncompetitive and cumbersome residential loan product." Unlike the loan applications offered to consumers by private installers, the GEMS application could not be completed online and approvals could take weeks. On top of that, until recently, interest rates on GEMS consumer loans were tied to credit ratings, topping out at nearly 10 percent. (Now all loans have a rate capped at 5.99 percent, although proposals to the PUC for five more GEMS loan products continue to state that interest rates may be as high as 9.99 percent.)


Gwen Yamamoto Lau

All these problems have been overcome now, Yamamoto Lau says, with the HGIA "having made the necessary internal program corrections." The only remaining obstacle, apparently, to the HGIA swiftly disposing of the balance in the GEMS fund is the PUC itself. "Streamlining the decision making process" — by which Yamamoto Lau means ending PUC involvement — "would enable the authority to react more quickly to market changes and deploy capital for green infrastructure investments in a timely manner to help meet the state's clean energy goals and objectives," Yamamoto Lau wrote in the annual plan.

In the coming fiscal year, she continued, the HGIA "plans to deploy $50 million in funds through its commercial (nonprofit and small business) PV plus storage products, residential PV plus storage products, residential and commercial energy efficiency products, and community solar products."

Yamamoto Lau does not elaborate further on that figure, other than to say that $9.6 million has been tentatively approved as a loan for solar water heating on Moloka'i.

Solar water heating is not one of the technologies that HGIA has opted to include in its lists of products approved for GEMS loans. In fact, it was very deliberately omitted at the outset of the PUC approval process in 2014.

At that time, Henry Curtis of the group Life of the Land noted, "Solar water heaters save more dollars per dollar invested than PV panels, they have shorter payback periods, but more importantly, solar water heaters decrease peak load." Why, then, should recipients of GEMS loans not be required to install solar water heaters before anything else?

In response, deputy attorney general Gregg Kinkley, representing DBEDT, referred back to the grand plan to have GEMS funds be augmented by investments from parties seeking tax relief: "As a public-private partnership, it is essential that [DBEDT] work with existing market players and deployment partners to have GEMS augment and expand the market to the underserved."

Mark Glick, who at the time headed up DBEDT's Energy Office, told *Environment Hawai'i* that other programs — including Hawai'i Energy, private administrator of the Public Benefits Fee — had programs that supported rebates for solar water heaters, "so we weren't going to establish efficiency first. … It was a choice that we didn't want to impede progress on moving forward with somebody who knows what they want to do."

Pushback

Almost all those submitting testimony on House Bill 1593 in the four committee hearings it received were in favor of turning at least part of the GEMS funds over to a rebate program.

Few addressed the provisions that would do away with PUC oversight.

Among those who did raise this issue were Dean Nishina, executive director of the Division of Consumer Advocacy, and Ray Starling, chair of the Hawai'i Energy Policy Forum's Energy Efficiency Working Group. (Until last year, Starling headed up Hawai'i Energy.)

As an automatic party to all PUC dockets, Nishina's office, better known as the consumer advocate, has the responsibility to represent the public's interest in reviewing the loan proposals brought to the PUC by the Hawai'i Green Infrastructure Authority as well as the HGIA's proposed annual plans.

Both in legislative testimony and in comments to the PUC, Nishina has vigorously disputed Yamamoto Lau's argument that PUC oversight is a hindrance to the smooth functioning of her agency.

"While the consumer advocate remains supportive of the idea of providing low-cost financing to underserved customers, the consumer advocate has significant concerns regarding HGIA's characterization of the docket approval process as 'the last remaining impediment' hindering HGIA's success," Nishina wrote in his comments on Yamamoto Lau's proposed annual plan for fiscal 2018.

"[D]espite HGIA's description of the oversight process as 'lengthy' and 'burdensome,' the filing of Program Notifications" — the means by which additions to the loan program offerings are approved — "associated comments, and commission approvals have all occurred within a fifteen-business-day period for eight of the eleven Program Notifications filed to date," Nishina wrote.

In testimony at the bill's final hearing, on April 4, Nishina again argued for ongoing PUC oversight. "Given that the GEMS program is essentially insured by general ratepayer contributions to the green infrastructure fund, it is important that there is adequate oversight in place to ensure the use of the funds is in the interest of all ratepayers who have made and will continue to make contributions to GEMS and not just in the interest of direct program beneficiaries," he stated. "As long as the GEMS program is funded or guaranteed by general ratepayers, commission oversight should be a prerequisite of the program."

In contrast, the Blue Planet Foundation, whose executive director, Jeff Mikulina, sits on the HGIA board, offered testimony sympathetic to Yamamoto Lau's position that PUC oversight was burdensome. "As a comparison, consider that the Public Benefits Fee Administrator (PBFA) does not file a program notification with the PUC to detail each new program offering or strategy as it becomes available. Instead, the PBFA files an annual plan for approval. This same approach may be reasonable for GEMS oversight," it stated.

Starling, testifying for the Hawai'i Energy Policy Forum, took exception to the idea that the PBF administrator enjoyed less oversight than the GEMS program. "Given the challenges of the GEMS program with making loans to date, continuing to have independent PUC oversight is the more prudent and preferred approach," he wrote. "In contrast, the competitively bid Energy Efficiency Rebate Program" — managed by the PBF administrator — "has three layers of third party oversight, all reporting to the PUC, not to mention performance goals with financial consequences."

Starling also pointed out the impact that using GEMS funds for rebates will have on ratepayers and the energy efficiency programs already supported through the PBF: "Because of the complex way the GEMS program was originally set up, every rebate dollar not paid back to GEMS as a loan will automatically diminish the Public Benefits

GEMS Administrator Anticipates On-Bill Loan Financing This Year

When the state's Green Energy Market Securitization (GEMS) loan program was established in 2013, all parties involved believed that customers who took out loans for installation of photovoltaic and other energy saving technologies would have the option of paying off the loan charges through their monthly utility bills.

That process, known as on-bill financing, was to be available not only to customers who financed these improvements with GEMS loans, but to all electric utility customers.

In June 2014, the Public Utilities Commission officially opened a docket that was aimed at working out the technical issues that would need to be addressed before on-bill financing could become a reality. It hired a consultant, AFC First Financial Corporation, to assist with the process. By January 2015, the PUC was able to release the "Hawai'i Energy Bill $aver Program: Program Manual," a document that, including appendices, ran to more than 100 pages.

The utilities seemed on board with this. In April, Hawaiian Electric notified the PUC that it had agreed on specifications for interfacing AFC First Financial. "Effective May 1, 2015," Hawaiian Electric told the PUC, "the agreed upon [information technology] interfaces should be capable of processing at least ten applications per day, increasing to at least 100 applications per day by June 1, 2015."

Although at this point, the on-bill financing system seemed to have a green light, it was never implemented. On May 20, 2016, more than a year after Hawaiian Electric notified the PUC that it was prepared to launch the program, the PUC suspended it.

What happened? Simply put, the company hired to administer on-bill financing quit. In October 2015, AFC informed the commission that it had been acquired by a company named RenewFinancial, and that RenewFinancial and AFC had no interest in continuing to fulfill the role of finance program administrator after the contract end date of December 31, 2015. (It may be worth noting that RenewFinancial, then known as Renewable Funding, was paid $1 million by DBEDT to develop the GEMS program.)

The PUC attempted to find a replacement administrator, but without success.

Although on-bill financing might be stalled for non-GEMS loans, the PUC did instruct Hawaiian Electric to work with the Hawai'i Green Infrastructure Authority to develop an on-bill repayment plan for GEMS loan recipients. Last December, the HGIA board authorized reallocating $247,000 of funds from its annual operating budget of $1 million to pay for studies of on-bill financing.

HGIA executive director Gwen Yamamoto Lau explained in an email to *Environment*

Fund by an equal amount, causing significant impact on Hawai'i's Energy Efficiency Program, by far the most cost-effective energy resource on our grid."

Much the same point was made by Randy Iwase, chair of the PUC. "Use of [Hawai'i Green Infrastructure Special Fund] moneys for purposes other than providing loans is inconsistent with the purpose and design of the loan program," he wrote. He added that if moneys in the fund "are provided as a rebate with no repayment obligation, as is proposed in this measure, then the commission may be forced to replenish the reduced PBF through an additional surcharge to ensure that the statutorily mandated [energy efficiency portfolio standard] goals are achieved."

A Breach of Contract?

Perhaps the most fundamental question raised by critics of HB 1593 was whether the use of bond proceeds for rebates, rather than loans, would constitute a breach of bond terms.

"The bond legal documents and the Public Utilities Commission's order [allowing the bond float] clearly state the purpose of the funds to be loans," wrote Murray Clay in testimony on behalf of the Ulupono Initiative. "A 'bait and switch' approach to financial markets where the state applies for funds for one reason and use[s] them for another is going to damage our state's reputation with the investment community."

Starling's testimony raised a similar point: "If the GEMS bond proceeds are diverted to 'rebates' instead of 'loans,' the GEMS program will be unable to make the bond repayments without significantly increasing fee charges to all utility ratepayers – not taxpayers. And, contrary to original legislative intent, the GEMS program would cease to be self-sustaining. Moreover, the GEMS program would be subject to complex and unintended consequences, which have not been fully explored nor explained."

— Patricia Tummons

For Further Reading

Environment Hawai'i has reported extensively on GEMS since March 2015.
Here are selected articles, all available online at *http://www.environment-hawaii.org:*

- "Rollout of Green Energy Loan Program Shows Limited Pool of Beneficiaries," March 2015;
- "Green Energy Loan Program Betrays Its Promise," editorial, March 2015;
- "New Green Infrastructure Fee Cuts Into Public Benefits Fund," March 2015;
- "Program to 'Democratize Clean Energy' Has Yet to Deliver on Promise of PV," July 2015;
- "State Green Energy Loan Funds Yields Few Measurable Results in 2nd Year," March 2016;
- "Solar Contractors Tell of GEMS Troubles," March 2016;
- "HECO Customers Keep Paying Vig on Unused $144 Million in GEMS Fund," June 2016;
- "Turmoil at GEMS," New & Noteworthy column, December 2016;
- "Latest Proposal to Use GEMS Fund Is Nixed by Public Utilities Commission," January 2017;
- "GEMS Costs of $13 Million a Year Borne by Hawaiian Electric Ratepayers," January 2017.

Supreme Court Grills Parties In Aquarium Fish Permit Case

Are minor actions permitted by the Department of Land and Natural Resources (DLNR)— or any other state agency, for that matter — exempt from environmental review under the Hawai'i Environmental Policy Act (HEPA)? A beach cleanup, a night of camping at a state park, the collecting of a fish or two for your kid's fish tank? Those are all activities that the DLNR requires permits for, but are they all "programs or projects" under HEPA that would require an environmental assessment, or at least an exemption determination?

In its ruling last August on a case involving just the DLNR's issuance of aquarium fish collecting permits, the Intermediate Court of Appeals stated, "not every level of regulated activity is meant to be swept into HEPA's reach." Citing past cases in which courts have found that HEPA does apply — the Superferry case, as well as a number of large residential developments — the appellate court found that those types of actions "stand in stark contrast" to aquarium fish collecting as permitted by state law, "which includes a parent netting one or two fish from a stream for his or her child's fish tank, as well as larger scale commercial operations. It would be unprecedented to apply HEPA to require individual Hawai'i citizens to undertake the [environmental assessment] process for such an activity."

Yellow tang off Kealakekua.

But the plaintiffs in that case — Rene Umberger, Mike Nakachi, Ka'imi and Willie Kaupiko, Conservation Council for Hawai'i, Humane Society of the United States, and Center for Biological Diversity — have argued that even if requiring an environmental review for the collection of a single fish might seem absurd, the ICA had a duty to analyze whether such a requirement would be "obviously inconsistent" with HEPA's purposes and policies.

"Indeed, such an outcome is not only entirely consistent with the statute's purpose — to ensure environmental concerns are given appropriate consideration before approving each discretionary permit — but dictated by it. In fact, the Legislature amended HEPA in 2012 specifically to shift the responsibility for preparing EAs from the approving agency to the applicant for applicant actions," the plaintiffs' attorneys argued in a filing with the state Supreme Court.

" 'Program or project' is broad on its face: it means deliberate activity, which includes trapping fish to stock aquariums. The ICA may believe this plain construction leads to undesirable results in the context of aquarium collection permits, but the Legislature is free to make laws that some might feel lead to questionable outcomes. It is not for the court to second-guess legislative wisdom, but to discern legislative intent and enforce it. The ICA failed to do so, leaving Hawai'i's reefs open for exploitation without informed agency oversight, in violation of HEPA's critically important purpose," they wrote.

They point out that the aquarium industry's self-reporting to the DLNR shows that the industry "annually extracts hundreds of thousands of marine animals from Hawai'i's reefs. Between 2005 and 2009, aquarium collectors harvested at least 2.2 million marine animals from West Hawai'i alone, and at least 8.3 million from waters statewide." It is this massive, unlimited industrial extraction that seems to concern them most.

During arguments before the Supreme Court on March 30, the very first question the justices asked Earthjustice attorney Summer Kupau Odo, representing the plaintiffs, was whether the parents collecting fish for their child's aquarium needed to conduct an EA.

Kupau Odo pointed out that HEPA has an exemption process that could apply to such small-scale actions that do not significantly affect the environment, but an

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Hawai'i that the money isn't actually paying for studies, but will support "extensive IT programming and testing" of an on-bill financing system that will allow HGIA's loan servicer (Concord Servicing) and the HECO companies to electronically transfer loan payment data on a monthly basis.

She continued: "Further, in an effort to be fiscally responsible, HGIA has requested PUC approval to utilize relevant and applicable documents, material, and tools already developed under the OBF docket." Yamamoto Lau said the HGIA was "working diligently with Concord and HECO" and that they expect the program to launch this year.

Financing, with Conditions

In the GEMS annual plan submitted in late March to the PUC, Yamamoto Lau included a request for PUC approval of "GEMS OBR [on-bill repayment] loan products to finance energy efficiency and/or renewable energy technologies, subject to a minimum 10 percent utility bill savings for the ratepayer."

The problems with calculating savings were laid out at length in the PUC's order suspending its work toward on-bill financing. Agreeing with recommendations of its on-bill financing working group, the PUC noted that "bill neutrality" would need to be assured before adding financing costs to customers' bills. Bill neutrality would be "based on the reasonable life of the equipment with a not-to-exceed maximum of 12 years and the payment calculation based on the price of equipment and electricity at the time of program enrollment."

But given the fluctuation of electricity costs, customers investing in energy-saving technology were essentially taking a risk, should energy prices decline. To help ensure savings for participants, the commission stated that "the level of savings … must be beyond bill-neutral."

The cost of electricity, the commission noted, "did, in fact fluctuate greatly during development of the [on-bill financing] program." In June 2014, when the on-bill financing docket was opened, the price of a barrel of oil was $105.79, the PUC wrote. By January 2016, the price of that same barrel "had decreased approximately 70 percent to $31.68." Over the same time, Hawaiian Electric residential rates on O'ahu dropped from an average of nearly 37 cents per kilowatt hour to 24 cents.

"This drastic drop in oil and electricity costs, coupled with the basic costs of the [on-bill financing] program, resulted in great difficulty in ensuring that savings for program participants would be beyond bill-neutral." ***— P.T.***

Kaua'i Utility, Agriculture Groups Commit To Restoring, Monitoring Diverted Streams

The Kaua'i Island Utility Cooperative (KIUC) seems willing to do almost anything to get its proposed pumped storage hydropower project along West Kaua'i's Koke'e ditch system built.

While not an original party to the water waste complaint and petition to amend interim instream flow standards filed in July 2013 by the community group Po'ai Wai Ola/West Kaua'i Watershed Alliance, the utility turned out to play a significant role in their final resolution.

In its filings with the state Commission on Water Resource Management, Po'ai Wai Ola, represented by Earthjustice, called for the state Agribusiness Development Corporation (ADC) and its tenant co-op, the Kekaha Agriculture Association (KAA), to stop wasting diverted stream water and also sought amendments to the interim instream flow standards of Waimea River and its tributaries.

Those tributaries, once diverted by the Kekaha and Koke'e ditches to provide irrigation water to the former Kekaha sugar plantation, now provide water to the ADC's tenants, which include diversified agriculture farmers as well as some of the state's largest seed companies.

An investigation by a contractor for the commission found that much of the water diverted in recent years was not used for agriculture but was instead used to power a hydropower plant. Excess water was dumped onto the ground.

KIUC, which has long been pursuing a pumped storage hydropower project using a portion of the Koke'e ditch and reservoirs owned by the state, participated in the petition/complaint negotiations once the commission hired Robbie Alm to facilitate mediation among ADC, KAA, and Po'ai Wai Ola. The state Department of Hawaiian Home Lands, which owns property served by the Koke'e Ditch system and has rights to some of the water, was also admitted as a party.

Under a mediated agreement approved by the Water Commission on April 18, KIUC will shoulder the cost of installing and maintaining monitoring systems that will track in real time the amount of diverted stream water entering and exiting Koke'e Ditch at certain spots.

The utility will also be responsible for modifying diversions along Koke'e Ditch to ensure perpetual, mauka-makai stream flow that provides for the migration of both adult and larval forms of aquatic life and minimizes entrainment of native species. The utility must file modification plans with the commission within four and a half months of the agreement's signing. Work must begin within 45 days of final required approvals.

Similar conditions apply to ADC and KAA with regard to the Kekaha Ditch system, although they must file modification plans much sooner — within 45 days of the agreement's signing. Under the agreement, a minimum of 6 million gallons (mgd) a day of water must flow in the Kekaha Ditch at all times, measured at the Hukipo flume.

If KIUC doesn't obtain commitments from the ADC and DHHL that are necessary for its hydro project in a timely manner, KIUC may withdraw from its commitments under the watershed agreement; responsibility to modify Koke'e Ditch and to monitor flows in and out of it will fall to ADC/KAA. If the utility fails to officially withdraw

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exemption determination would still have to be made. She suggested that the current level of permitted aquarium fish collecting is not small-scale. She pointed out that there were 160 commercial permits at the time the plaintiffs filed their complaint in 2012. There were probably about 70 recreational permits.

When asked by chief Justice Mark Recktenwald about the ICA's apparent concern that permits for other activities — camping, hunting, fishing — might be subject to environmental review under the plaintiffs' view of the case, Kupau Odo said that "how HEPA applies in other contexts is irrelevant. … We are looking at a very specific permit that allows unlimited extraction of our resources." Camping permits, for example, do not allow for that, she noted, adding that aquarium fish collection permit applicants must also prove to the DLNR that they have the means to keep the fish collected alive.

When it came time to question deputy attorney general William Wynhoff, who represents the DLNR, the justices pressed him on why an environmental review shouldn't apply to the permits. The DLNR had argued that the plaintiffs want "actions" under HEPA to include "all deliberate human activity," which he argued would be absurd. But, as Justice Recktenwald noted, aquarium fish collection as permitted by the DLNR is not *any* human action.

"It's not taking a step outside of your house. … Her [Kupau Odo's] argument is there is an element of purposefulness and complexity that goes beyond *any* purposeful human activity," Recktenwald said.

Justice Sabrina McKenna added that under HEPA, the DLNR could create an exemption for families removing up to five to ten fish a year for aquarium purposes.

"We can create an exemption. Yes, we can. It involves at least two things: we have to look at an activity and we have to consult with outside agencies," Wynhoff replied.

If small-scale, recreational aquarium fish collecting can be addressed via a DLNR exemption, there would still remain the issue of whether or not commercial permittees should be required to conduct an EA. In her questioning of Wynhoff, McKenna seemed to think that the DLNR not only needed a proper assessment of aquarium fish collecting impacts, but it had already amassed some information that could be used in an EA.

She first took issue with a statement in one of the DLNR's filings that the plaintiffs' claim that aquarium fish collecting is harming the environment "is simply false."

"How do you know it's false without doing a study?" she asked Wynhoff.

Wynhoff began citing data in a declaration by Alton Miyasaka of the DLNR's Division of Aquatic Resources suggesting that the aquarium industry's impacts were geographically limited.

"Isn't this the kind of information that would be included in an EA?" she asked.

"Yes," Wynhoff replied. He then went on to point out that the DLNR's data on aquarium fish collecting show the catch has remained constant "over many, many years."

"Again, isn't this the kind of information that would be included in an EA?" she asked.

"Yes," he replied.

"In other words, the information would be available to do an EA," she said, noting that HEPA allows for a group of actions to be included in a single EA. "You could require all of these applicants to do one study together," she suggested.

—Teresa Dawson

State Prevails in Preliminary Round Of Ma'alaea Condemnation Proceeding

The state of Hawai'i has won a major preliminary battle in its years-long effort to condemn a parcel of vacant land at Ma`alaea Harbor that it has leased, at sky-high rates, since 1994.

At a hearing April 27, 2nd Circuit Judge Rhonda Loo determined that the value the state would have to pay to condemn the land would be based on the value of the land only, and not the land plus whatever rent remains to be paid for the term of the lease (which runs through 2024).

The lease dates back to September 1994, when the Department of Land and Natural Resources' Division of Boating and Ocean Recreation entered into what may be, on a per-square-foot-basis, the costliest lease of privately owned land the state has ever entered into. If judged by the usefulness of the land over the intervening years, it's the hands-down winner.

The parcel of leased land at Ma'alaea Harbor on Maui is about an acre in size and, from the time the 30-year lease took effect until today, the state has made no improvements on the site. The only income it has generated has come from allowing a restaurant sign to be placed on the property for $18 a month for a short time and allowing part of the site to be used as a staging area when the Ma'alaea Ocean Center was being built, which netted the state about $50 a month for a year.

That revenue pales when contrasted to what the state has been paying to the landowner, Don Williams. Initially, annual rent was set at roughly $150,000 a year. Under escalator clauses in the lease, it increased every two years, to $300,000 (not including excise tax), and then to $350,000. Although the lease rent was initially pegged to the land value, when land values sank in the late 2000s, the state was still stuck paying the high rent, thanks to a provision in the lease that says lease rents can never drop.

Since 2002, then, the state has been paying more than $1,000 a day in lease rent. On top of that, because the state is exempt from paying property taxes on land it owns or leases, Maui County has been deprived any tax revenue from the site for nearly a quarter of a century.

In June 2013 the state began efforts to condemn the property through eminent domain. The case had been set to go to jury trial on May 8, but that is postponed for now. The attorney representing Williams has said he intends to file an interlocutory appeal of Loo's April 27 ruling.

Determining the basis on which the land's value would be established was a key issue in the case. If the lease were to remain in place for the next seven and a half years, the state would be paying more than $2.5 million in additional payments to Williams, over and above the roughly $7 million in rent payments it has already made to him.

Attorney Robert Thomas, who represents Williams, disputed the state's contention that the state should pay only the appraised value of the unencumbered land. The lease itself has value since it insures an income stream to Williams, he argued. By paying only for the fee, the state, he wrote, would eliminate "a valuable property interest (indeed, the most valuable aspect of ownership of the Ma'alaea land is the right to receive $350,000 annual rent from the state)…"

In addition, Thomas asserted that the state had changed its position from the time of the original filing of the condemnation action. In 2014, he wrote, "the state argued that just compensation includes future rent payments which would have been paid by the state."

Deputy attorney general Dan Morris disputed that. In the original filing, "the state condemned (and is only obligated to compensate for) the *unencumbered fee* interest rather than the leased fee interest or the income stream," he replied.

Judge Loo agreed that whatever contentions the state had made in its earlier filings, the state's condemnation law supports the determination that valuation should be based only on the fee-simple interest.

Appraisals

One of the issues sure to be litigated is the value of the land, both with and without the lease. According to the state's motion to limit land valuation to the fee-simple interest (excluding lease value), a recent appraisal prepared for the state by the Hallstrom Group set the unencumbered fee value at $3.115 million — the same value that it came up with in 2013, when the state filed the condemnation action in 2013.

The land-plus-lease value, however, has increased since then. In 2013, it was estimated at $4.165 million, which is the amount the state has deposited with the court to cover estimated just compensation. Now, Hallstrom estimates the value of the leased-fee at $5.06 million, an increase of $895,000.

Not surprisingly, the appraisal done for Williams comes in higher. Robert Spangler, who appraised the property for Williams, adjudged the leased fee interest to be $7 million. ***— Patricia Tummons***

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from the agreement within 100 days of signing, it must proceed with its promised modifications regardless of whether or not it secures its necessary commitments.

If KIUC succeeds in getting its energy project built, it will be allowed to receive a rolling average of 11 mgd from the Koke'e Ditch system to support its pumped storage hydro project and DHHL's water needs (an estimated 7 mgd), assuming that instream flow standards are met first.

Under the agreement, stream restoration will occur in two phases, with Phase 1 beginning immediately. In this phase, the existing natural flow in Koke'e Stream will be allowed to flow past Koke'e Ditch. The combined flows for three other streams diverted by the Koke'e system — Kauaikinana, Kawaikoi, and Waiakoali — will total about 7 mgd.

For the Kekaha ditch system, the flow standards will be 2 mgd for Koaie stream, 8 mgd for Waimea stream below the Waiahulu diversion and 25 mgd at a U.S. Geological Survey meter.

Phase 2 occurs once KIUC completes its renewable energy project. Under Phase 2, the existing natural flow in Koke'e Stream will be permitted to flow past Koke'e Ditch except for flows greater than 1.2 mgd, in which case the flow standard is set at 1.2 mgd. Flow standards for the other three streams diverted by Koke'e Ditch would total 5.4 to 5.8 mgd, depending on total stream flows. KIUC would be allowed to use any excess water for its project.

The agreement makes clear that "no diversion will ever be a total diversion again" and that even if water is needed for other beneficial uses, such as agriculture or renewable energy, "the health of the stream must be preserved at all times." ***— T.D.***

BOARD TALK

Kokeʻe Cabin Squatter Case Highlights DLNR's Property Management Defects

What happens when the state Department of Land and Natural Resources doesn't have sufficient staff to properly manage its properties and permits?

In 2015, agents on loan from the department's Land Division helped the Division of Boating and Ocean Recreation — which had been without a property manager for years — discovered that more than two dozen of its revocable permits hadn't been officially renewed since at least 2011 and that rents had been set piteously low for no apparent reason.

More recently, having acquired two new property managers, the department's Division of State Parks has also been identifying cases where tenants have been occupying properties improperly for years and/or not paying any rent at all. Parks administrator Curt Cottrell presented one of the more egregious cases at the March 10 meeting of the Board of Land and Natural Resources.

In that case, a squatter and his many dogs were found to have been living full-time — which is illegal — in one of the division's 130 or so recreational cabins at Kokeʻe State Park in West Kauaʻi. He claimed to have been given permission to live there from one of the cabin's lessees, Dennis Riker. Neither Riker nor his co-lessee Paul Kyno had paid the $4,500 annual rent on the cabin for years nor had they provided proof of required liability insurance. And according to Cottrell, what had once been "a cute, little, quaint Kokeʻe cabin with a beautiful yard" has become severely degraded and decayed.

Cottrell recommended terminating the lease, retaining the $5,000 deposit, and authorizing the Department of the Attorney General to collect the remaining $15,000 or so in outstanding rent and fees.

When asked by Kauaʻi Land Board member Tommy Oi how the delinquent rent was allowed to get so high, the division's deputy administrator Alan Carpenter admitted that the division had been remiss in its duties. The lessees had been notified in 2013 to pay back rent owed at the time, which they did, but the division had not pursued any unpaid rents since then.

"This is partially due to the loss of our property manager," Cottrell explained, referring to the passing of former property manager Steve Soares. Cottrell added that his staff had been more focused on chasing down larger sources of income, but now that he has two new property managers, they're able to do more "deep dives" on some of the messier cases.

"There are other violations at Kokeʻe. This is by far the worst," Carpenter said.

Carpenter said that Kyno — who at one time had been paying the rent on his own, but stopped after Riker moved onto the property (in violation of the lease) — indicated he'd like to keep the cabin, but that wasn't an option. Kyno did not attend the March 10 board meeting.

"He would rather put this behind him. While he would rather not pay, … he realizes it may come to that," Carpenter said.

With regard to Riker, Carpenter said the division can't find him and Kyno has no idea where he is, either.

The Land Board approved Cottrell's recommendations, but lamented the extent to which rent defaults seem to be occurring. Maui member Jimmy Gomes said that with regard to the Land Division's properties, he's been seeing the same names of people in default for the past three years.

"Why hasn't that been addressed? Is it the same thing that Curt had, no property management? The stack is an eighth of an inch thick," Gomes said, referring to the lists of those in default that are provided to all Land Board members.

Land Board chair and DLNR director Suzanne Case suggested that the division simply doesn't have enough staff. According to her Maui land agent, his branch has 400 pending default cases, Case said, adding that that number excludes active cases.

"It's a capacity issue," she said.

"We're way less than 400. Thank God," Cottrell added.

Whatever the reason for the backlogs, Land Board member Chris Yuen stressed the need for prompt and decisive action when dealing with rent defaults. He noted that the Land Division has an automated system that immediately identifies when a lease or permit term has not been met.

"If X does not happen, it's supposed to show up on a report and action should happen," he said. Addressing concerns raised by Land Board member Stanley Roehrig in the Kokeʻe cabin case about whether or not proper notice had been given, Yuen said, "We have to not play defense lawyer for the lessees when they bring it to the board." If the divisions don't take timely action, word gets out, and lessees may decide they have better uses for their money and wait until next year to pay the state, he said.

"These things cannot be let go. There are things that are less important, but when they don't pay their rent, we gotta get on them," he said.

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Land Board Renews Haʻena Curator Agreement

While State Park properties at Kokeʻe and elsewhere may be suffering as

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a result of short-staffing in the division, that doesn't seem to be the case at Ha‘ena State Park, where the non-profit group Hui Maka‘ainana o Makana has cared for and enhanced the resources there under a curatorship agreement first granted in 2000 to restore several taro patches, or lo‘i kalo.

When State Parks administrator Curt Cottrell recommended to the Land Board in late January that the agreement with the group be renewed for another five years, he noted that it was "nice to be able to come before the board when something is working really well."

"Since 2000, the role of the Hui has expanded to include restoring and caring for additional sites in the park, assisting with the master planning for Ha‘ena State Park, and serving as an active advocate for the Ha‘ena Community Based Subsistence Fishing Area located offshore of the park," a staff report to the Land Board states. "The Hui has hosted numerous educational and cultural groups from Hawai‘i and the Pacific, received several awards for their service and restoration projects, and continue to donate over 6,000 volunteer hours annually to the restoration and maintenance of the cultural sites in the park."

"I wish I could clone them and place them in other parks," Cottrell told the board.

Group president Presley Wan said that the hui has a long history of taking care of the place. If one were to put a price on the amount of time and effort the group has spent caring for the park in just the last five years, "it's over a million dollars," he said.

The Land Board unanimously approved the agreement's renewal. In the next five years, the group is expected to open an additional six lo‘i, assist with the repair and restoration of two historic house sites, and help the division with plans for a cultural gathering area in the park, among other things.

PHOTO: DLNR

A lo‘i kalo at Ha‘ena State Park, Kaua‘i.

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Kohala Ahi Farm Finally Bows Out

In October 2009, Hawai‘i Oceanic Technology, Inc. (HOTI) won Land Board approval for a Conservation District Use Permit for its proposed bigeye tuna fish farm off the North Kohala coast of Hawai‘i island. A year later, the Land Board approved the issuance of a 35-year ocean lease for 247 acres to the company. HOTI originally planned to raise the fish in 12 untethered ocean spheres that would remain stationary via thrusters powered by ocean thermal energy conversion.

The novel project faced strong opposition from members of the native Hawaiian and conservationist communities concerned about the environmental impacts of such an unproven technology.

By 2012, the company was struggling to meet financing and construction conditions of its permit and lease. The Land Board granted some relief over the next year or so by extending HOTI's construction deadlines and easing its performance bond requirement, despite the fact that the Department of Land and Natural Resources' Office of Conservation and Coastal Lands had received hundreds of letters in opposition. Even with the amendments, however, HOTI never built or installed a single fish cage, and this past January, the Land Board approved the mutual cancellation of the lease.

HOTI CEO Bill Spencer told the Land Board that the main reason for the farm's failure was the difficult permitting process.

"I would say that, number one, financing for the project was made difficult by the fact that it took eight years to get all of the permits," he said, noting that four of those permits were from the U.S. Army Corps of Engineers.

"They were concerned that every 'T' was crossed and 'I' was dotted so they wouldn't get sued by environmental organizations and others. That was also true of EPA," he continued.

Spencer said that the project still could have pulled through, but he blamed the controversy over the development of the Thirty Meter Telescope (TMT) on Mauna Kea for scaring away a potential investor.

"I would say last year we were being considered to be acquired by a Fortune 50 company … but things were going on with the Big Island regarding the TMT tended to dampen their enthusiasm for a project like this. … The precautionary principle can sometimes be a paralyzing principle with something new and different," he said.

(For more on the fish cage project, read our June 2013, April 2012, and December 2010 Board Talk columns, as well as our December 2009 article," Tuna Cage Project off Kohala Wins Conservation District Use Permit." All articles are available at environment-hawaii.org.) ***— T.D.***